

Guidelines for providers of insurance and superannuation under the *Disability Discrimination Act 1992 (Cth)*

2016

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1 Introduction to these guidelines

The Commonwealth *Disability Discrimination Act 1992* (the DDA) aims, as far as possible, to promote the rights of people with a disability to participate equally in all areas of life. It does this by making it unlawful to discriminate against a person with a disability in a range of areas, subject to certain exceptions.

The DDA generally makes it against the law to discriminate against a person because of disability when providing insurance and superannuation. This covers all forms of general, health and life insurance issued by registered insurers, and includes underwritten and non-underwritten applications and policies issued by insurers.

However, the DDA recognises that some discrimination is necessary in the insurance business. It contains a partial exemption for insurance and superannuation providers in s 46. It also contains a general defence which may apply to providers where not discriminating would cause them unjustifiable hardship.

The Australian Human Rights Commission (the Commission) has the power to make guidelines to assist better understanding of rights and obligations under the DDA.¹ These guidelines are not regulations and are not legally binding. However, they provide the Commission's views on the interpretation of the DDA and information on how it has been applied in cases in practice. They provide guidance as to when discrimination by insurance and superannuation providers may be lawful, and when it may be unlawful.

These guidelines are intended to:

- help providers of insurance and superannuation to comply with the DDA, in making decisions in individual cases and in developing broader policies and procedures
- explain what distinctions or exclusions may be reasonable in offering insurance to people with a disability
- explain factors that courts may take into account in deciding a complaint about disability discrimination.

These guidelines replace the earlier *Guidelines for Providers of Insurance and Superannuation* published by the Commission in 2005,² and 2012.³

2 What is the definition of 'disability' in the DDA?

'Disability' has a very broad meaning in the DDA and includes:

- physical disability
- intellectual disability
- psychiatric or psychological disability (including mental illness)
- sensory disability
- neurological disability

- learning disabilities
- physical disfigurement
- the presence in the body of disease-causing organisms (such as hepatitis C or HIV).⁴

It includes a person with one disability as well as someone with more than one disability. It applies whether the disability is total or partial, and whether the person:

- currently has a disability
- has had a disability in the past (for example, a past episode of mental illness)
- may have a disability in the future (for example, because of a genetic predisposition to that disability)
- is imputed as having a disability (for example, a person is thought to have HIV/AIDS).

A disability that ‘may exist in the future’ can include a condition that was present in a person’s body, but not yet diagnosed, at the time the policy was purchased. It can also include a disability that did not yet exist or had not been diagnosed, was not known to the person or others or was not otherwise apparent.⁵

For example, in Ingram v QBE,⁶ VCAT found that, for the purposes of anti-discrimination laws, the definition of ‘disability that may exist in the future’ applied to Ms Ingram where she had no pre-existing mental illness at the time the policy was issued but a depressive disorder manifested and was diagnosed subsequently.

Over 4 million people in Australia, nearly 1 in 5, experience disability, according to the most recent data from the Australian Bureau of Statistics.⁷ People with disability, as well as their friends, relations and colleagues, constitute a significant group of consumers.

3 What constitutes discrimination?

Section 24 of the DDA makes it against the law to discriminate against a person because of their disability either:

- by refusing to provide them with goods or services or make facilities available; or
- because of the terms or conditions on which, or the manner in which, the goods, services or facilities are provided.

Discrimination can be direct, meaning a person with disability is treated less favourably than a person without that disability in the same or similar circumstances.

For example, it would be direct discrimination to refuse to insure someone because he or she is blind.

Discrimination can also be indirect. Indirect disability discrimination can happen when conditions or requirements are put in place that appear to treat everyone the same, but actually disadvantage some people because of their disability.

For example, requiring all applicants for insurance to provide details from a driver's licence for identification indirectly discriminates against anyone who is unable to drive because of a disability.

The DDA also requires businesses to make reasonable adjustments to enable a person with disability to access goods, services or facilities.⁸ A failure to make such adjustments itself may constitute discrimination.

Reasonable adjustments may be relevant to the way in which standard terms of superannuation or insurance are obtained. For example, it may include providing contracts of insurance in accessible formats that meet the needs of persons with disability.

Reasonable adjustments by superannuation and insurance providers might also include offers of insurance on non-standard terms that take into account the particular circumstances of the person. These adjustments may mean that a person is able to obtain a policy that they would not otherwise be provided because of their disability. If non-standard terms are offered, this may involve exclusions or higher premiums. In assessing whether these terms constitute reasonable adjustments, the following factors may be relevant:

- whether the exclusion or higher premium is reasonable given the particular circumstances of the person
- whether there are clear and specific time limitations on the application of the exclusion or higher premium to the policy
- the criteria the insured would be required to satisfy to have the exclusion removed or premium reduced
- the process involved in removing or amending the non-standard exclusion or premium.

The aim of imposing a duty to make all reasonable adjustments is to eliminate, to the extent possible, the discriminatory treatment of persons with disabilities.⁹ An adjustment to be made by an insurance or superannuation provider consistently with achieving this aim is a reasonable adjustment unless making the adjustment would involve an unjustifiable hardship on the provider.¹⁰ The concept of unjustifiable hardship is discussed in more detail in section 5 below.

Discrimination in insurance and superannuation happens at the time of the particular act complained of — which may be a refusal to provide cover, an offer of a policy on non-standard terms that are not reasonable taking into account the circumstances of the person, or a subsequent refusal to pay a claim. The date of the insurance contract, insurance policy or superannuation policy will not necessarily be decisive. It will depend on the circumstances of each case.

For example, a customer signed a contract of insurance in 1990 containing an HIV/AIDS exclusion clause. If an insurer refuses a claim in 2004 on the basis of the exclusion, this refusal will be covered by the DDA even though the contract was signed before the DDA came into force.

4 Partial exemption for insurance and superannuation

Section 46 of the DDA provides that discrimination in relation to provision of insurance or superannuation by either refusing to offer a product, or in respect of the terms or conditions on which the product is offered or may be obtained, is not unlawful if the discrimination:

- is based upon actuarial or statistical data on which it is reasonable to rely, and the discrimination is reasonable having regard to the matter of the data and other relevant factors¹¹ (the data limb)

or

- in a case where no such actuarial or statistical data is available and cannot reasonably be obtained — the discrimination is reasonable having regard to any other relevant factors¹² (the no data limb).

An insurance or superannuation provider who seeks to rely on the s 46 exemption to establish the discrimination is lawful must be able to show that the requirements of either the data limb or the no data limb have been met.

However, these limbs are sequential. The data limb must be considered before the no data limb.¹³ An insurer or superannuation provider cannot choose to argue that the 'no data limb' of the exemption applies if data is available or reasonably obtainable which meets the requirements of the data limb.¹⁴ If such data is available, an insurer or superannuation provider cannot ignore it.¹⁵

Reliance on the s 46 exemption involves considering each of the following questions in turn, set out below and in the flow chart on p 8:¹⁶

- Did you base your decision to discriminate on actuarial or statistical data?
- If so:
 - is it objectively reasonable for you to rely on that data?
In considering whether it is reasonable to rely on actuarial or statistical data, you should take into account whether:
 - the data is applicable to the particular decision in question;
 - the data is subject to any qualifications;
 - there is a sufficient sample for reliable use;
 - the data is complete;
 - the data is up to date;
 - the use of the data set has been discredited;

and

- is the discrimination objectively reasonable having regard to this data and other relevant factors of which you are aware (or ought to be aware)?

If the answer to both of these questions is 'yes', then the 'data limb' of s 46 applies. Ensure that the document recording the relevant decision refers to the data relied upon.

If the answer to either of these questions is 'no', then the exemption in s 46 does not apply.

- If you did not base your decision on relevant actuarial or statistical data, is such data available or could it reasonably be obtained?
- If so, the 'no data limb' is not available and the exemption in s 46 does not apply:
 - That is, if relevant data is available or could reasonably be obtained, it must not be ignored. Any disability discrimination in relation to superannuation or insurance should be based on relevant actuarial or statistical data where it is available or could reasonably be obtained.
 - It is therefore prudent for insurance and superannuation providers to obtain relevant data where they intend to discriminate on the basis of particular disabilities. If they do not obtain such data, but a court later finds that they could reasonably have done so, then they will not be able to rely on the 'no data limb'.
- If not, the 'no data limb' is potentially available.
- In cases where there is no data, is the discrimination objectively reasonable having regard to other relevant factors?

Those factors should include:

 - practical and business considerations
 - whether less discriminatory options were available
 - the individual's particular circumstances
 - the objects of the DDA, especially the object of eliminating disability discrimination as far as possible
 - all other relevant factors of the particular case.

Did you base your decision to discriminate on actuarial or statistical data?

Yes

Is it objectively reasonable for you to rely on that data?

Consider whether:

- the data is applicable to the particular decision in question;
- the data is subject to any qualifications;
- there is a sufficient sample for reliable use;
- the data is complete;
- the data is up to date;
- the use of the data set has been discredited.

AND

Is the discrimination objectively reasonable having regard to this data and other relevant factors of which you are aware (or ought to be aware)?

If the answer to both of these questions is YES: the 'data limb' of s 46 applies. Ensure that the document recording the relevant decision refers to the data relied upon.

If the answer to either of these questions is NO: the exemption in s 46 does not apply.

No

Is relevant actuarial or statistical data available or could it reasonably be obtained?

Yes

The 'no data limb' is not available and the exemption in s 46 does not apply.

That is, if relevant data is available or could reasonably be obtained, it must not be ignored. Any disability discrimination in relation to superannuation or insurance should be based on relevant actuarial or statistical data where it is available or could reasonably be obtained.

It is therefore prudent for insurance and superannuation providers to obtain relevant data where they intend to discriminate on the basis of particular disabilities. If they do not obtain such data, but a court later finds that they could reasonably have done so, then they will not be able to rely on the 'no data limb'.

No

The 'no data limb' is potentially available.

Is the discrimination objectively reasonable having regard to:

- practical and business considerations
- whether less discriminatory options were available
- the individual's particular circumstances
- the objects of the DDA, especially the object of eliminating disability discrimination as far as possible
- all other relevant factors of the particular case?

If YES, the 'no-data limb' of s 46 applies.

4.1 What actuarial or statistical data is reasonable to rely upon?

(a) General considerations applicable to all data

A provider of insurance or superannuation should consider actuarial or statistical data if it is available or reasonably obtainable. The following sections set out some of the more common types of actuarial and statistical data on which it may be reasonable to rely, depending on all the circumstances.

The question of whether it is reasonable for a provider to rely upon particular data involves ‘an objective judgment about the nature and quality of the actuarial or statistical data’ in each case.¹⁷

The Federal Court has suggested that it may not, for example, be reasonable to rely on data where that data is out-of-date, qualified, incomplete, discredited, based on an insufficient sample size, or not directly applicable to the particular situation, and the decision-maker ought to know this.¹⁸

As the data-limb exemption requires the discrimination to be ‘based’ on the relevant data, this means that the data must have been available at the time of the discrimination.¹⁹ In addition, the insurance or superannuation provider must also be able to show that the data was actually considered and relied upon.

For example in Ingram v QBE, QBE accepted that it had no actuarial data to rely on when it included a mental illness exclusion in a travel insurance policy. QBE submitted an actuarial report at the hearing in 2015, but this could not be relied upon under s 46(2)(f) of the DDA because it was not available to QBE at the time it made the decisions in relation to the content of the policy and Ms Ingram’s claim for indemnity. Instead, QBE referred to other contemporaneous data and asked the tribunal to infer that QBE took this data into account in making the relevant decisions. The tribunal refused to make the inference sought by QBE, noting that QBE had not produced any evidence to establish that any person involved in the drafting or approval of the policy wording had any knowledge of or regard to that contemporaneous data.²⁰

This means that it is important for insurance or superannuation providers to keep accurate records of the actuarial or statistical data that they rely on when making relevant decisions. Failure to do so may mean that the s 46(1)(f) and (2)(f) exemptions cannot be relied upon, even if relevant data was publicly available at the relevant time.

(b) Underwriting manuals

Insurers may use appropriate manuals that include detailed information about the nature and degree of extra risk associated with insuring people with the particular disability in question.

As indicated by the Federal Court, however, courts may examine whether data in underwriting manuals is reasonable to rely on, including whether data is reasonably complete and up to date. Manuals should be based on relevant actuarial or statistical

data or medical opinion and updated as necessary to take into account advances in medical knowledge, rehabilitation and treatment, adaptive technology or other areas affecting the level of risk or loss associated with a particular disability.

Case study of reliance on outdated underwriting manual

A woman with vision impairment complained that she had been discriminated against by an insurer which was only prepared to issue her with a life insurance policy subject to an exclusion clause where blindness contributed to accidental death. The insurer regarded this as reasonable by reference to actuarial data and other evidence and thus as lawful under DDA s 46. After further discussion the insurer determined that the underwriting manual it was using was outdated. The matter was settled, without admission of liability, with the policy being re-issued with a modified exclusion clause covering only situations where blindness is a symptom of a primary health condition leading to death, and a policy change to take blindness into account only where material to the risk and then to apply more up-to-date underwriting guidelines to determine whether the proposal should be accepted with or without some additional premium loading.

(c) Local data

Insurers and superannuation providers may use relevant domestic population or insurance studies that include specific data collected from a reliable source, about people with the disability. This may include government studies such as census statistics, studies reported in major medical journals, experience studies conducted by individual insurance companies, and insurance studies produced by the Institute of Actuaries of Australia if they are relevant to the risks under consideration.

For example, in Ingram v QBE, among the evidence tendered, QBE referred to a National Survey of Mental Health and Wellbeing from the Australian Bureau of Statistics, and a report on mental health services by the Australian Institute of Health and Welfare.²¹ VCAT recognised that these are credible sources but identified problems in relying on them in the circumstances given the nature of the policy taken out by Ms Ingram. One reason for this was that these reports contained prevalence data (the proportion of the population that has a particular health related condition) but not incidence data (the occurrence of new cases during a particular time period).²² Ms Ingram's policy contained an exclusion for pre-existing conditions, so arguably the most significant issue for the insurer in the circumstances of Ms Ingram's case was how likely it was that there would be a new incident of mental illness after the travel insurance policy was taken out and before the travel was undertaken.²³

(d) International studies

It may be reasonable for insurers to rely on relevant international population or medical studies that include data about disability-related risks, particularly where local data is unavailable or insufficient. Insurers relying on overseas data should be prepared to demonstrate, if necessary, that overseas data remains reasonably applicable in Australian conditions.

For example, in Xiros v Fortis Life Assurance Ltd, the respondent insurer relied, among other data, on information from an underwriter which established from European data that in 1995 the three-year survival rate after AIDS diagnosis was still less than 20 per cent, and that there had been a 130 per cent increase in AIDS cases from heterosexual contact in the USA between 1992 and 1993.²⁴

(e) *Relevant domestic and international insurance experience*

It may be reasonable to take into account the relevant claims experience of the insurer concerned and of other insurance companies. As with the other categories of data referred to above, whether or not reliance on past claims experience is reasonable may depend on whether the data is up to date, directly applicable to the particular situation and of a sufficient sample size.

Note that industry experience may be relevant either to demonstrate that refusal of cover, or the offer of cover at a higher premium or with restrictions, was reasonable, or that it was not. Such experience can only be relied upon when the experience is relevant and the reliance is reasonable. Decisions based on previous experience of the insurer concerned or other insurers would need to be derived from some analysis of the policies or practices to establish that it is relevant to the discrimination that is being contemplated.

For example, in Ingram v QBE, evidence about the policies of other insurers was found to be of limited assistance due to the variability of approaches and the lack of evidence about the bases for such variability.²⁵

4.2 What ‘other relevant factors’ may contribute to a decision that discrimination is reasonable?

Aside from relevant statistics or actuarial data, to be protected under s 46 a decision to discriminate needs to be shown to be reasonable in light of ‘other relevant factors’.

The Federal Court has stated that a ‘relevant’ factor would include ‘[a]ny matter which is rationally capable of bearing upon whether the discrimination is reasonable’.²⁶ This includes factors that may increase the risk to the insurer as well as those that may reduce it.

The following are some examples.

(a) *Medical opinions*

If relying on medical opinion, it must be on a medical matter.

For example, as population and insurance studies usually only cover single disabilities in isolation, a specialist medical opinion may be required to assess the risks of someone who has more than one disability to assess the combined effect of the disabilities.

However, it is important to recognise that medical experts and actuaries have different skill sets. There may be limits on the ability of medical experts to quantify

risk. The risk of a claim being made against an insurance policy is primarily an actuarial question.

Expert opinion regarding risks that pertain to a particular disability might appropriately be sourced from experts such as medical researchers who have statistical experience and academic medical qualifications.

Where the opinion of a medical practitioner is sought, it should be from a medical practitioner with relevant expertise in assessing risks relevant to the particular disability.

For example, an area of medicine in which knowledge is rapidly developing and experience is changing, such as HIV/AIDS, may require a medical practitioner with detailed knowledge in the disease.

Medical opinions regarding the diagnosis, symptoms and likelihood of relapse that pertain to an individual with a disability (either seeking an insurance policy, or making a claim under an insurance policy), might appropriately be provided by: a treating practitioner of the individual concerned; or an independent medical practitioner with appropriate expertise, access to all of the relevant medical history that pertains to the individual, and the opportunity to examine that individual.

It may be reasonable to defer a decision on insurance to seek clarification of medical issues.

For example, in one case received by the Commission a woman complained that she had been discriminated against when she was refused loan insurance after disclosing on the application form that she had received treatment for melanoma 14 years previously. The insurer expressed concern that the medical reports provided had not satisfactorily addressed issues of probability of morbidity (illness or disability) rather than only mortality, noting that the policy would cover disability as well as death. After an additional medical report was obtained by the applicant addressing these issues satisfactorily the complaint was settled, with the insurer agreeing to provide insurance cover for the remaining period of the loan without charge.

(b) Relevant information about the particular individual seeking insurance

The circumstances of the individual ought to have particular prominence as a 'relevant factor'. Decision-making processes which are formulaic or which tend to stereotype individuals by reference to their disability should be avoided.²⁷ Therefore, where available, information about the particular person seeking insurance such as medical opinions and work records may be relevant in assessing whether they present a higher or lower risk than the average person with the disability concerned. Such records should only be relied on where it is reasonable to do so in the circumstances. Further information may be required regarding this data in order to avoid discrimination, for example the simple fact that an individual has taken sick leave cannot necessarily be linked to a particular disability without further information.

Consideration of individual circumstances would necessarily require consideration of a range of factors. Some examples might include:

- *type of disability*: there are, for example, substantial differences between anxiety, affective and psychotic disorders. These differences require a difference in approach. Assumptions should not be made that the symptoms of one disability indicate a risk of a more severe disability where they are unrelated
- *severity of the disability*
- *functional impact of disability*: the degree of impact on functionality of any disability can vary from person to person
- *treatment plans*: it may be relevant to look at information on whether a person is or is not receiving treatment for a condition such as a mental illness, so as to reduce risks associated with the condition
- *employment records*: it may be relevant in certain circumstances to consider specific and appropriate information about a person's work attendance record when assessing the effect of an existing disability in relation to income protection insurance.

In many cases access to full medical histories may not be necessary. Often a report from a treating clinician would suffice to allow consideration of factors such as severity and functional impact of a disability.

Where personal medical information is being sought from a person seeking insurance or superannuation products, it is important that they are fully informed about the nature of the medical records that are sought, why those records are being sought (that is, what is the relevant issue at hand and how will the records assist the insurer to make a determination) and the range of outcomes they can expect as a result of the provision of the information. This is important in ensuring that the person is able to provide informed consent to disclose their medical records.

(c) Opinions from other professional groups

Bearing in mind the need to consider the specific circumstances of the individual concerned, it may also be reasonable to rely on the opinion of other professionals with relevant experience, for example occupational therapists, physiotherapists, clinical psychologists or mobility trainers.

Again, it is important to recognise that these professional experts have different skill sets to actuaries and there may be limits on their ability to quantify risk.

(d) Actuarial advice or opinion

It may be reasonable to rely on actuarial advice or opinion to assist in quantifying the risk of insuring someone with a particular disability if there is no other data available and the opinion is from a relevant source. Actuarial opinion may be helpful in interpreting medical studies or making allowances for differences in degree of disability between an individual applying for insurance and the study population.

(e) *Practice of others in the insurance industry*

It is permissible when determining whether the discrimination is reasonable to have regard to the fact that another insurer with the same or similar knowledge was prepared to issue a policy to the person (including the terms on which they were prepared to do so).

For example, in QBE v Bassanelli, the Magistrate at first instance was presented with extensive evidence about travel insurance policies offered by other insurers to persons with pre-existing conditions. The Magistrate regarded that evidence as of little weight except for those travel insurance policies that Ms Bassanelli actually purchased after QBE refused her cover. On appeal, Mansfield J found that the fact that another reputable insurer with apparently the same or similar knowledge was prepared to issue a policy of travel insurance excluding claims relating to her pre-existing medical condition for the same travel was a matter that the Magistrate was entitled to consider as relevant.²⁸

It is not reasonable, however, to refuse to insure a person with a disability simply because of historical practice, however widespread, or to rely on inaccurate assumptions about people with a disability.

(f) *Commercial judgment*

Assessing the likelihood of an insurance claim can sometimes go beyond medical and statistical probability. Other relevant commercial factors may be taken into account so long as it is reasonable to do so.

For example, there may be circumstances, such as when there is evidence that a person has made fraudulent claims in the past or where there is clear evidence that a particular mental illness creates a higher propensity for fraud, in which it is reasonable for an insurer to consider an individual's claims history or propensity or incentive to make a fraudulent claim when assessing the overall risk of insuring someone with a particular disability. This does not, however, entitle insurers to rely on untested discriminatory assumptions.

4.3 When will it be 'reasonable' to discriminate?

The Federal Court has stated that '[w]hether the discrimination is shown to be reasonable is a question of fact in all the relevant circumstances'.²⁹ The question of whether the discrimination is reasonable 'is a judgment to be made objectively with the knowledge and in the circumstances of the discriminator, but including factors of which the discriminator ought to have been aware'.³⁰

A court assessing whether discrimination was reasonable for the purposes of s 46 is required to 'weigh the nature and extent of the discriminatory effect on the one hand against the reasons advanced in favour of the requirement or condition on the other'.³¹ Matters taken into account include:

- practical and business considerations
- whether less discriminatory options were available

- the individual's particular circumstances
- all other relevant factors of the particular case
- the objects of the DDA, especially the object of eliminating disability discrimination as far as possible.

For example, in considering whether there were less discriminatory options available to refusing travel insurance to Ms Bassanelli entirely, the court in QBE v Bassanelli considered whether QBE could have offered a travel insurance policy which excluded pre-existing medical conditions (as other reputable insurers subsequently issued to her); and whether QBE could have offered a policy that covered only property loss and damage (as QBE had in issued in the past to other customers).³²

Similarly, in considering the individual's particular circumstances, although QBE pointed to 50 or so difficult causation claims that it had experienced over a 20-year period involving a claimant with a pre-existing condition similar to Ms Bassanelli's, the court considered that this evidence was merely anecdotal and did not relate specifically to Ms Bassanelli's pre-existing medical condition. It was not a sufficient basis to exclude her from insurance for any personal illness or accident, even if it was unrelated to her pre-existing medical condition.³³

Case study on assessing reasonableness: *Xiros v Fortis Life Assurance Ltd*³⁴

Mr Xiros took out a mortgage protection insurance policy underwritten by Fortis which included death and permanent disablement plus temporary disablement cover in 1995. He was subsequently diagnosed as HIV positive. In 1996 he ceased work due to his deteriorating health and depression. In 1997 he submitted a claim under the policy which was declined on the basis that 'the policy excludes all claims made on the basis of the condition of HIV/AIDS'.

Mr Xiros brought a complaint under the DDA alleging that he was suffering from a disability in the form of his HIV positive status and that Fortis had discriminated against him by providing him a policy of mortgage protection insurance which included an exclusion against cover for conditions relating to HIV and AIDS, and by refusing to pay the claim he made under the policy. The Human Rights and Equal Opportunity Commission (as the Australian Human Rights Commission was then called) was unable to conciliate the complaint, and Mr Xiros filed an application in the Federal Magistrates Court.

Fortis argued that the discrimination was not unlawful because it was covered by the exemption in s 46(2) of the DDA. Applying s 46(2), in assessing whether it was reasonable for Fortis to have discriminated against Mr Xiros, Driver FM considered the statistical and actuarial data submitted by Fortis and various other relevant factors, including:

- whether Mr Xiros was aware of the exclusion clause at time of taking out the policy
- whether the policy was a voluntary or compulsory form of insurance, and whether a medical examination was required prior to a policy being offered

- the fact the policy offered was a low-premium policy (the cost of which was approximately \$100 per annum), reflecting the insurer's assessment of the risk to it of having to make payments under the policy according to its terms
- evidence of the rapid increase in HIV and AIDS infections in Australia during the 1980s and 1990s (covering the period when the complainant took out the policy and made a claim under them)
- evidence of the concern in the insurance industry in Australia in this period of the risk of 'anti-selection' (described as the practice of selecting insurance to provide cover against a risk to which a person is particularly susceptible), the fact this risk was increased in the case of voluntary insurance, and 'in circumstances where the insurer does not have the opportunity to properly assess its insurance risk at the time that individual policies are proposed, for example, where no medical examination is required'
- information and reports from the Life Insurance Federation of Australia (LIFA) in the 1990s regarding:
 - the mortality rate and life expectancy of persons who contracted HIV and AIDS
 - that AIDS claims had had a significant impact on the life insurance industry, despite the operation of the exclusions then in place — for the 12 months ending December 1992, life insurance companies had paid out about \$50 million in death and disability claims, nearly \$25 million of which was paid in AIDS related group life claims
 - HIV/AIDS has many characteristics that make it materially different from other diseases which may require special underwriting measures.³⁵

Driver FM also held that the actions of Fortis should be measured against the circumstances applying (including the information available) at the time of the discriminatory acts.³⁶

Driver FM concluded that Fortis was entitled to rely on the exemption provided by s 46(2) of the DDA in these circumstances, and therefore had not breached the DDA.

Significantly, the fact that there was a reasonable basis for an exclusion in an insurance policy when it was first taken out does not mean that there will be a reasonable basis for maintaining an exclusion if circumstances change.³⁷ Insurers should regularly reassess exclusions which discriminate on the basis of disability to ensure that it is reasonable to maintain them.

(a) *Guidance as to what is **not** reasonable discrimination*

It will not be reasonable and therefore will be unlawful under the DDA for a provider of insurance or superannuation to:

- refuse to insure a person with a disability simply because the provider does not have any data if it would otherwise be reasonable to provide insurance having regard to other relevant factors
- refuse to insure a person with a disability merely because of historical practice

- base decisions about insurance or superannuation on inaccurate assumptions or stereotypes of people with disability
- impute a disability merely from the fact that a person has consulted with a medical practitioner
- impute a disability merely from the fact that a person has failed to disclose to an insurer that they consulted with a medical practitioner
- impute a disability from information disclosed by a person if the person has not disclosed that they have a disability and the imputation is not supported by medical opinion.

It is particularly important that any assumptions which underpin the decision to discriminate are supported by reasonable evidence.

For example, while it may be reasonable to make certain assumptions if data reasonably links a particular type of disability with someone being predisposed to future complications or the possibility of secondary disabilities, it is not reasonable to assume, without evidence, that someone who is blind in one eye because of an injury is more likely than anyone else to become blind in the other eye.

For example, it is not reasonable to assume without evidence that people with one disability are more accident-prone and more likely to incur a workplace injury than co-workers without a disability, or that people with a disability are at greater risk of becoming unable to work.

For example, it is not reasonable to assume that someone who has in the past consulted a psychologist has an increased likelihood of suffering from a mental illness and to refuse insurance cover on that basis.

**Case study on impermissibility of relying on generalisations/stereotypes:
QBE v Bassanelli³⁸**

Ms Bassanelli sought a travel insurance policy from QBE to cover a proposed trip to Japan. She disclosed to QBE that she had been diagnosed with and treated for metastatic breast cancer. She did not expect to obtain travel insurance in respect of any events related to or arising from the disclosed medical condition. However, QBE declined to issue any policy to her, citing her medical condition. Another company subsequently issued a policy to Ms Bassanelli which excluded any claims relating to her pre-existing medical condition and she completed her travel arrangements.

She complained to the Human Rights and Equal Opportunity Commission (as it then was) that QBE had discriminated against her contrary to the DDA. QBE sought to rely on s 46 and the defence of unjustifiable hardship.

The Commission terminated the complaint and Ms Bassanelli brought a claim in the Federal Magistrates Court. In relation to the claimed s 46 exemption, the Court held that QBE's discrimination against her was not reasonable. QBE appealed to the Federal Court.

Mansfield J in the Federal Court held that the Federal Magistrate had been correct to conclude that QBE's discrimination against Ms Bassanelli was not reasonable in all the circumstances.

The reasoning given by QBE for refusing any policy was that it was generally difficult in cases of metastatic breast cancer to determine whether certain medical conditions are associated with a pre-existing condition, due to the large number of possible medical complications suffered by a person with metastatic cancer.

Mansfield J noted that there was evidence before the court that there were events and medical conditions which could be readily identified as caused by metastatic breast cancer but that these were quite unlikely to arise during a six day holiday to Japan. There were also conditions which may arise which were well known as potentially related to metastatic breast cancer and which QBE should reasonably readily be able to identify as related to that illness. Finally, there were incidents which could occur on overseas travel 'which, although apparently unrelated to the illness, may be more prolonged or complex or difficult to treat by reason of the illness'. However:

[QBE's] evidence did not go near to showing the extent to which such problems might arise, or at what cost, or how they might be addressed, in the case of the respondent. Instead, by virtue of the anecdotal claims experience which did not relate specifically to the respondent's pre-existing medical condition, the appellant discriminated against the respondent.³⁹

Mansfield J concluded that QBE could not bring itself within s 46 because it:

applied a decision-making process which was too formulaic or which tended to stereotype the respondent by reference to her disability. Such grouping of individuals, whether by race or disability, without proper regard to an individual's circumstances or to the characteristics that they possess, may cause distress or hurt. ... Legislation such as the DD Act is aimed to reduce or prevent such harm. Section 46 of the DD Act recognises that there are circumstances in which discrimination by reason of disability may be justified (or, at least, not be unlawful). It requires that the particular circumstances of an individual who is discriminated against be addressed, but not in a formulaic way.⁴⁰

(b) Alternatives to refusing to provide any cover

The existence of s 46 in the DDA acknowledges that in some cases risks associated with a person's disability may be too high, or too uncertain, for an insurer to accept.

However, as the Federal Court's decision in *QBE v Bassanelli* shows, before declining to offer insurance to a person with a disability, an insurer or superannuation provider should consider whether risks can be reduced by restricting the cover, using an exclusion clause, applying a premium loading, or some other means.

Discrimination will only be accepted as reasonable if the consequences of the discrimination are limited as far as reasonably possible.

For example, a woman said she experienced post-natal depression and a lower-back injury during her pregnancy. She said the insurer offered her an income protection

policy but it included a five-year exclusion for claims associated with mental-health issues and an indefinite exclusion for any claims relating to lower-back injury. The insurer claimed the exclusions were consistent with relevant underwriting guidelines and based on relevant statistical and actuarial data on which it was reasonable to rely.

The complaint to the Commission was resolved with an agreement that the insurer consider removing the exclusion for lower-back injury pending the provision of up-to-date medical information. The insurer also agreed to review the mental-health exclusion after two years with a view to removal of the exclusion.

The relevance of considering alternatives to refusing to grant a policy when determining whether discrimination was reasonable was considered in *QBE v Bassanelli*, discussed above.⁴¹ In summary, the Federal Magistrates Court and Federal Court in the *Bassanelli* case appear to have confirmed that:

- excluding cover for pre-existing conditions is an accepted part of insurance
- insurers should consider use of appropriately limited exclusion clauses as an alternative to denying cover
- it may be reasonable to charge a higher premium for cases which are reasonably assessed as presenting a higher risk or where risks are unusually difficult to determine
- this approach should also be considered before refusing cover
- it may be reasonable to defer a decision in order to seek further information on risks.

Any alternatives to refusing policies or denying claims should also be reasonable, proportionate to the risk that is being avoided and impose the least imposition or restriction on the person that is possible in the circumstances. Where the alternative still imposes a discriminatory burden, it must be supported by data where it is available or can reasonably be obtained and satisfy the other requirements of the exemption in s 46 of the DDA.

Exclusion clauses in relation to pre-existing conditions or particular identified risks have been used in a number of cases to settle complaints and enable policies to be issued.

For example, a computer programmer wished to protect his family income in the event of illness or accident preventing him from carrying out his usual employment. He has a vision disability which may result in him being totally blind in a few years. His applications for income protection insurance were refused. The complaint to the Commission was settled without admission of liability on the basis that the insurer provided the complainant with disability income insurance with a blindness exclusion.

4.4 Practical tips to avoid unlawful discrimination

To minimise the risk of unlawful discrimination, the Commission suggests that providers of insurance and superannuation:

- seek to ensure good communication with people who are insured or seeking insurance, so that information is brought out which might reduce or eliminate the need for a discriminatory decision
- before refusing to provide cover:
 - provide the opportunity to the applicant to either provide further information, including supporting medical documents, or withdraw the application
 - consider whether alternatives such as providing a policy with an appropriate exclusion clause, restricting the cover or imposing an additional premium would effectively manage any additional risk
- give reasons to customers for decisions, as clear communication about concerns and about reasons for decisions may help to avoid unlawful discrimination, and also avoid complaints resulting from misunderstandings about justifiable decisions
- when non-standard terms or higher premiums are applied this might also include:
 - advice about how long the non-standard terms or higher premiums would apply
 - any criteria that would need to be satisfied to have the policy ‘standardised’
 - the process for removing or amending the non-standard terms or higher premiums
- ensure that applications for insurance that reveal a mental health condition or symptoms of a mental health condition are not automatically declined
- refer applications for insurance that reveal a mental health condition or symptoms of a mental health condition to an appropriately qualified underwriter.

Finally, insurance and superannuation providers may develop their own action plans under Part 3 of the DDA. Action plans include policies and programs with particular goals and targets for an organisation to meet in order to further the objects of the DDA. The Commission publishes a register of action plans on its website.⁴²

These action plans can be taken into account under s 11(e) in determining whether a hardship imposed on an insurance and superannuation provider (for example, a hardship imposed in avoiding particular discrimination under s 29) is an unjustifiable hardship.

5 The defence of unjustifiable hardship

Most issues about limitation and exclusion of insurance or superannuation will be dealt with under s 46. The DDA, however, also contains a more general exception to unlawful discrimination in providing, goods, services or facilities, known as the defence of unjustifiable hardship.

Section 29A of the DDA provides that it is not unlawful for a provider of insurance or superannuation to discriminate against a person with a disability if it can be shown that providing cover would cause unjustifiable hardship. It is important to note that, even if providing insurance or superannuation to a person with a disability might involve some costs and effort, it will not necessarily amount to unjustifiable hardship.

In *Ingram v QBE*, the Victorian Civil and Administrative Tribunal (VCAT) considered the defence in s 29A of the DDA, and explained:

It is apparent from the terms of section 29A that some hardship is justifiable. In order to determine whether that hardship is unjustifiable turns on the nature and degree of the hardship in the context of the section 11 DDA factors and any other relevant circumstances. A financial burden may be justified, given the objectives of the DDA in respect to the elimination of discrimination as far as possible. While the financial burden which may be imposed will be relevant, it is not the only factor to consider. If the financial burden is minor, then it is not likely to fall within the exception. If, on the other hand, it is very significant and might lead to the relevant entity not being financially viable, then the exception is more likely to apply. What is required is for an assessment to be made of whether some decision or action might be taken to avoid the discrimination and whether it would impose an unjustifiable hardship.⁴³

Section 11 of the DDA states that all relevant circumstances of a particular case are to be taken into account in determining whether a hardship imposed on a person is unjustifiable. In the context of the provision of superannuation or insurance services, these circumstances include:

- any benefits that might accrue to the customer with a disability or any other person (including other people with the same disability, the community generally, or even the insurer) if cover was provided
- the effect of the disability of the person concerned (the steps required to be taken to avoid discrimination against a person will depend on the nature of the person's disability)
- any costs or other disadvantages of providing cover, bearing in mind the financial circumstances of the insurance or superannuation provider (noting that a level of hardship that may be unjustifiable for one insurer may not be for another: 'Clearly the larger the company the more it can usually afford'⁴⁴)the availability of financial and other assistance to the insurance or superannuation provider
- the terms of any action plan developed by the insurer or superannuation provider under s 64 of the DDA that are relevant.⁴⁵

This list is not exhaustive. In *Ingram v QBE*, QBE submitted that prudential standards for insurers issued by the Australian Prudential Regulation Authority under the *Insurance Act 1973* (Cth) were relevant to the financial impact of removing the mental health exclusion from the relevant policy.⁴⁶ In particular, QBE submitted that if the exclusion were to be removed it would suffer a loss and be required to hold an additional amount of capital to secure its travel insurance business as a result of APRA's capital adequacy requirements. Ms Ingram commented that this may just be the cost of doing business in a non-discriminatory way.⁴⁷ Ultimately no findings were made about the impact of these regulatory obligations as no evidence about the obligations was called at the hearing.

In assessing the extent of the benefits that might accrue to the customer with the disability if the discrimination had been avoided, it is relevant if alternatives were offered to the complainant which would have provided some benefit, rather than just an absolute refusal to provide the service.⁴⁸ Therefore, in relation to insurance, like under s 46 it is relevant for the purposes of s 29A if the insurer offered alternatives to

refusing cover, such as offering a policy but with an exclusion for pre-existing conditions, or a policy with a higher premium.

Case study on the defence of unjustifiable hardship: *Ingram v QBE*⁴⁹

Ms Ingram applied for a travel insurance policy from QBE in December 2011 to cover a planned trip to New York in 2012. The policy included a general exclusion for any claims arising directly or indirectly from mental illness.

In early 2012 Ms Ingram was diagnosed with and treated for depression, which resulted in her deciding to cancel the trip for health reasons. In May 2012 Ms Ingram's mother lodged a claim under the travel insurance policy, which QBE denied, relying on the general exclusion. In its 4 December 2012 correspondence with Ms Ingram's mother, QBE said that mental illness is excluded from the policy because its statistics demonstrated that in travel policies there is a high risk of cancellation because of mental illness.

Ms Ingram brought a claim under the DDA. QBE sought to rely on both s 46 and s 29A of the DDA.

In considering whether the defence in s 29A of the DDA applied, VCAT Member Dea stated that regard may be had to all the relevant circumstances, including QBE's financial circumstances, and the estimated amount of expenditure required to be made by QBE. Member Dea said that the latter 'touches on the interests of other policy holders and shareholders'.⁵⁰

Identifying the decision or action which could be taken to avoid the discrimination may depend on the way in which the complaint of discrimination is framed.⁵¹ Once the action is identified, the question under s 29A is whether it would cause unjustifiable hardship for the insurer to have taken that action. In *Ingram*, Member Dea held that the question under s 29A was whether it would cause unjustifiable hardship to QBE to remove the general mental illness exclusion from all policies, not just the policy offered to Ms Ingram.⁵² There was no evidence before the tribunal about whether a modified version of the mental illness exclusion could have been applied in Ms Ingram's case.

The burden of proving that unjustifiable hardship would be caused rests on the person seeking to rely on the defence, in this case the insurer QBE.⁵³ Member Dea ultimately held that QBE had not adduced sufficient reliable evidence to support the conclusion that removing the exclusion clause in relation to mental illness would result in an overall reduction in profits.⁵⁴

Turning to the balancing exercise required under s 11 of the DDA to determine if unjustifiable hardship has been established, Member Dea made findings that:

- 'if the mental health exclusion were removed from the QBE policy, the effect on Ms Ingram and other policy holders subject to the same terms, would be that they might have had their claims met (section 11(1)(a) and (b))'⁵⁵
- 'the community would benefit from an action which would lessen the stigmatising effect of negative attitudes towards mental illness (section 11(1)(a))'⁵⁶

- ‘Clearly the burden of any detriment arising from the removal of the mental illness exclusion would fall on QBE, its policy holders and shareholders because the impact would be primarily financial (section 11(1)(a) and (c))’⁵⁷
- ‘a reduction in profits might be sufficient to amount to an unjustifiable hardship. Due to the significant reservations I have about ... the evidence produced in this case by QBE, I cannot safely find that there would be a reduction in profits. ... in so far as QBE relied on the financial factors to demonstrate that it falls within section 29A of the DDA, it has not met its burden of proof.’⁵⁸

Member Dea concluded that:

The consequence is that, when undertaking the balancing task required by section 11, there is an absence of sufficient material for me to determine that it would be an unjustifiable hardship for QBE to be unable to rely on the mental illness exclusion. The scales weigh in favour of people like Ms Ingram being able to be properly assessed on their policy claims in the same way people with physical disabilities are assessed.⁵⁹

The Member therefore held that QBE could not rely upon the defence of unjustifiable hardship in s 29A of the DDA.⁶⁰

It should be noted that in this case Member Dea stated that ‘This has not been a test case but rather is a case of a kind commonly run in the tribunal. My findings have turned on the evidence placed before me in circumstances where each party has very properly pursued its interests vigorously’.⁶¹ The particular findings in this case in relation to the policy offered by QBE may not apply to all insurers.⁶²

It was also noted in Ingram, citing Commissioner Innes in *Francey v Hilton Hotels of Australia Pty Ltd*,⁶³ that the costs involved in avoiding the discrimination and the financial circumstances of the person incurring those costs should not be given any greater weight than the other factors set out in s 11. All the factors are to be considered within the context of the legislation and the circumstances of the case.

¹ *Disability Discrimination Act 1992* (Cth) s 67(1)(k).

² For archive purposes, available at <https://www.humanrights.gov.au/our-work/disability-rights/publications/disability-guidelines-providers-insurance-and-superannuation> (viewed 16 May 2016).

³ For archive purposes, available at <https://www.humanrights.gov.au/guidelines-providers-insurance-and-superannuation-0> (viewed 16 May 2016).

⁴ *Disability Discrimination Act 1992* (Cth) s 4(1).

⁵ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [49].

⁶ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936.

⁷ Australian Bureau of Statistics, 2015, *Disability, Ageing and Carers, Australia: First Results*, cat. no. 4430.0.10.001. At <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4430.0.10.001> (viewed 8 June 2016).

⁸ *Disability Discrimination Act 1992* (Cth) sub-ss 5(2) and 6(2).

⁹ Explanatory Memorandum to the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (Cth), pp 8-9 [41-8]-[41-9].

¹⁰ *Disability Discrimination Act 1992* (Cth) s 4 (definition of ‘reasonable adjustment’)

¹¹ *Disability Discrimination Act 1992* (Cth) sub-ss 46(1)(f) and (2)(f).

¹² *Disability Discrimination Act 1992* (Cth) sub-ss 46(1)(g) and (2)(g).

¹³ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [28].

- ¹⁴ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [33].
- ¹⁵ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [33].
- ¹⁶ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [30]-[34].
- ¹⁷ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [30].
- ¹⁸ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [30].
- ¹⁹ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [30]; *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [89].
- ²⁰ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [90], [99]-[100] and [117].
- ²¹ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [91]-[92].
- ²² *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [182] and [211].
- ²³ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [185]-[190] and [202]-[211].
- ²⁴ *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 (6 April 2001) [16(k)].
- ²⁵ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [185] n 89.
- ²⁶ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [53].
- ²⁷ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [85].
- ²⁸ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [40]-[44].
- ²⁹ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [79].
- ³⁰ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [31].
- ³¹ *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 (6 April 2001) [16] (referring to *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395 in which Dawson and Toohey JJ referred with approval to a decision of the Federal Court in *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 263). See also *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [51].
- ³² *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [21], [40]-[43] and [45].
- ³³ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [81] and [83].
- ³⁴ *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 (6 April 2001).
- ³⁵ *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 (6 April 2001) [16].
- ³⁶ *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 (6 April 2001) [16]-[17].
- ³⁷ *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 (6 April 2001) [17].
- ³⁸ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88.
- ³⁹ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [83].
- ⁴⁰ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [85].
- ⁴¹ *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, see [19], [57] and [45]-[48].
- ⁴² Australian Human Rights Commission, *Register of Disability Discrimination Act Action Plans*. At <https://www.humanrights.gov.au/our-work/disability-rights/action-plans/register-disability-discrimination-act-action-plans> (viewed 29 September 2016).
- ⁴³ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [127].
- ⁴⁴ Explanatory Memorandum to the Disability Discrimination Bill 1992 (Cth), p 7.
- ⁴⁵ See *Disability Discrimination Act 1992* (Cth) s 11(1).
- ⁴⁶ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [214].
- ⁴⁷ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [216].
- ⁴⁸ See *King v Jetstar (No 2)* [2012] FCA 8 (13 January 2012) [256].
- ⁴⁹ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936.
- ⁵⁰ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [77].
- ⁵¹ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [135]-[136].
- ⁵² *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [136].
- ⁵³ See *Disability Discrimination Act 1992* (Cth) s 11(2).
- ⁵⁴ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [222].
- ⁵⁵ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [239].
- ⁵⁶ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [240].
- ⁵⁷ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [241].
- ⁵⁸ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [244].
- ⁵⁹ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [245].
- ⁶⁰ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [246].
- ⁶¹ *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [302].
- ⁶² *Ingram v QBE Insurance (Australia) Ltd* (Human Rights) [2015] VCAT 1936, [11] and [260].
- ⁶³ (1997) EOC 92-903, 77,453.