

AUSTRALIAN HUMAN RIGHTS COMMISSION
SEX DISCRIMINATION ACT 1984 (CTH), section 44(1)
NOTICE OF REFUSAL OF A TEMPORARY EXEMPTION

By this instrument, the Australian Human Rights Commission has refused the application of Auto & General Insurance Company Ltd, A & G Insurance Services Ltd, Australian Insurance Holdings Pty Ltd and their employees, officers, agents, insurance distributors and contractors (collectively the Applicants) for an exemption pursuant to section 44(1) of the *Sex Discrimination Act 1984 (Cth)*(SDA).

SUMMARY

The Applicants sought an exemption from the SDA to allow them to price motor vehicle insurance differentially on the basis of marital status. The Applicants provided expert evidence and actuarial data which suggested that there was a connection between marital status and tendency to make an insurance claim. The exemption was sought for a period of five years.

The Applicants sought an exemption so that they may obtain a commercial advantage by being allowed to price their product more competitively. The Applicants stated that the majority of their customers, who describe themselves as married or cohabiting, would obtain a discount in the price of their insurance premium.

The Commission is of the view that the exemption proposed by the Applicant is inconsistent with the objects of the SDA and the intention of Parliament. The Commission also finds that there are some factors which cast doubt on the tendency of the data provided by the Applicants to support their claim that there is a connection between marital status and propensity to make an insurance claim. Having considered the totality of the material before it, the Commission is of the view that the considerations which favour the grant of the exemption are outweighed by the considerations which favour the refusal of the application. The Commission therefore refuses the application.

REQUEST

The Applicants are providers of motor vehicle insurance and affiliated companies. The Applicants sought an exemption from sections 22(1)(b) (terms on which goods and services are provided), 22(1)(c)(manner in which goods and services are provided) and 27 (requests for information in order to discriminate) of the SDA to allow them to price motor vehicle insurance differentially based on marital status.

The Applicants sought an exemption for five years, the maximum allowable period under section 44(3)(c) of the SDA.

The Applicants sought to limit the exemption to circumstances where the discrimination is:

- a) based upon actuarial or statistical data from a source on which it is reasonable to rely; and
- b) reasonable having regard to the data and any other relevant factors.

BACKGROUND

The Applicants advise that since 2003 they have collected data about the marital status of their customers. They advise that their affiliates in South Africa and the United Kingdom commonly use marital status as a rating factor in calculating motor vehicle insurance.

The Applicants state that the data that they have collected displays similar trends to that collected by their overseas affiliates. The Applicants state that having regard to the claims ratio, which is the value of claims made by customers compared to the income earned from those customers, cohabiting and married customers perform more profitably than the average whereas all other categories of customers perform less profitably than the average. The Applicants state that even when drivers under 40, who are more likely to be single, are removed from the dataset, there are still material differences in the claims ratio based on marital status.

In support of the application, the Applicants provide an expert report from an actuary. The actuary's report expresses the opinion that based on the data provided to him by the Applicants, it is reasonable to assume that marital status is explaining the difference in experience between drivers of different marital statuses.

Addressing the Commission's guidelines on exemptions under the SDA, the Applicants submit that it is consistent with the scheme and objectives of the SDA for the Commission to grant an exemption to the Applicants. The Applicants note that the exemption that they seek is not dissimilar to the permanent exemption found in section 41 of the SDA. Section 41 of the SDA provides that it is not unlawful to discriminate on the ground of sex in the provision of insurance if the discrimination is based on actuarial or statistical data and the discrimination is reasonable having regard to the data.

The Applicants submit that there is no reason to assume that Parliament intended that people deserved less protection from discrimination on the grounds of their sex than they receive because of their marital status. The Applicants state that it is more likely that Parliament was not conscious that there might be different risk associated with different marital status.

The Applicants contend that there is an arguable case that without an exemption, pricing motor vehicle insurance policies according to marital status may amount to discrimination. The Applicants state that there is no way for them to avoid discriminating if they are to price motor vehicle insurance policies in a competitive way and in a way that is consistent with their international affiliates and competitors.

The Applicants state that if they are permitted to use marital status as a rating factor, it would allow them to more accurately and commercially price their products and offer increased discounts to their customers who perform more profitably.

Submissions received by the Commission

The Applicants' request for a temporary exemption was posted on the Commission's website and interested parties were invited to comment on the application.

The Commission received five submissions in response to the Application. One submission supported the application and one submission opposed it. The other

three submissions do not come to a concluded view on whether the Commission should grant the exemption.

The Insurance Council of Australia stated that as a matter of principle it supports the granting of exemptions to general insurers from anti-discrimination obligations where such practices are satisfactorily supported by statistical or actuarial data.

The Acting Anti-Discrimination Commissioner of Queensland (AADCCQ) submitted that the Commission should not grant the proposed exemption. The AADCQ notes that the exemption proposed by the applicants is similar to that contained in section 41 of the SDA. However, the AADCQ notes that if Parliament had intended for discrimination based on marital status in the provision of insurance to be unlawful, it would have legislated in these terms.

The AADCQ notes that if the application were granted, the Applicants would charge higher premiums to customers who are separated, divorced, single and widowed. The AADCQ claims that single parents and some older people will fall within these groups. The AADCQ submits that granting the exemption would further disadvantage groups of people who are already economically disadvantaged. The AADCQ contends that it is not in the community interest to grant an exemption with this potential effect.

The AADCQ notes that the Applicants' seek an exemption so that they may price their product more commercially. The AADCQ states that, if the Commission grants an exemption to the Applicants, it may lead to other insurers pricing insurance policies according to marital status which could have the effect that certain groups are priced out of the market.

The Office of the Anti-Discrimination Commissioner, Tasmania outlined the factors that the Commissioner considers when determining whether to grant an exemption under the *Anti-Discrimination Act 1998* (Tas). However, the Office notes that under section 30 of the *Anti-Discrimination Act*, a person may discriminate against another person on the ground of gender, marital status or relationship status in the provision of a service relating to insurance or superannuation if the discrimination is based on actuarial, statistical or other data from a reliable source, and it is reasonable having regard to such data and any other relevant factors.

The Office advises that it is its practice not to grant a temporary exemption where a permanent exemption applies. Accordingly, the Office advises that if it was satisfied that the conduct for which an exemption is sought would be covered by the permanent exemption contained in section 30 of the *Anti-Discrimination Act*, it would refuse the exemption. The Office states that if the Commission grants the exemption, there should be a requirement that the respondent produce the actuarial or statistical data on which it relies.

The Anti-Discrimination Board of New South Wales (NSWADB) made a brief submission given that at the time of making the submission, the President of the NSWADB had refused a similar application and that application was before the Administrative Decisions Tribunal of New South Wales (ADT). However, the NSWADB noted some of its concerns about the application. The NSWADB stated that the Applicants' proposal to price motor vehicle insurance differentially based on marital status is contrary to the objects and purpose of discrimination legislation generally and does not, for instance, redress past or present discrimination.

The NSWADB noted that irrespective of whether the intention is to provide favourable discounts to some groups of people, this would result in less favourable treatment on the basis of domestic or marital status for those who paid higher premiums or did not obtain the benefit of discounted premiums.

The NSWADB argued that Parliament clearly did not intend that there should be a specific exception for insurance on the ground of marital or domestic status given that this ground is not included in the permanent exemption relating to insurance.

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) noted that there is an inter-relationship between the SDA and the *Equal Opportunity Act 1995* (Vic) (EOA). VEOHRC advises that section 43(1)(a) of the EOA (now section 47(1)(a)) excepts insurers from the EOA's prohibition of certain forms of discrimination if the discrimination is permitted under the SDA.

VEOHRC notes that the exemption contained in section 41 of the SDA is confined to sex, and does not extend to discrimination on the ground of marital status. VEOHRC submits that this narrow framing would appear to be an indicator of certain policy decisions that ought to guide the exercise of the discretion contained in section 44 of the SDA.

VEOHRC stated that the view that insurance exemptions may be best limited in relation to particular personal attributes is one shared by the Victorian Scrutiny of Acts and Regulations Committee (SARC). VEOHRC advised that after its review of the exemptions and exceptions contained in the EOA, SARC recommended that the scope of the insurance exemption in the EOA be narrowed to permit discrimination on the ground of sex, impairment and age only.

VEOHRC noted that in *Lifestyle Communities Ltd (No 3)*¹, Bell J considered how the discretion to grant an exemption under equal opportunity law is to be applied within a human rights framework.

Bell J noted that there are two ways that an exemption can be granted consistently with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). Section 8(4) of the Charter states that "measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination." VEOHRC states that if an exemption can satisfy section 8(4) of the Charter, it ought to be granted.

VEOHRC noted that Bell J found that the second way that an exemption from anti-discrimination law may be granted is when an exemption, whilst not a special measure, would involve permissible limitations on the right to equality because those limitations are reasonable, necessary, justified and proportionate within the meaning of section 7(2) of the Charter.

VEOHRC stated that in Victoria, the Charter requires that a human rights approach is taken to the consideration of the exercise of the discretion whether to grant an exemption from anti-discrimination law. However, VEOHRC submitted that this approach draws upon international human rights jurisprudence relating to the right to equality and so is relevant even in jurisdictions without human rights legislation.

¹ *Lifestyle Communities (No 3)* [2009] VCAT 1869.

Further information received from the Applicants

In January 2010 the Applicants made submissions addressing the submissions received by the Commission in response to the application.

In May 2010 the Commission raised concerns about the tendency of the data produced by the Applicants to support the application and invited the Applicants to provide further data in support of their Application.

In August 2011 the Applicants made further submissions and provided three further affidavits in support of the application.

REASONS FOR DECISION

The Commission has considered all of the material that has been placed before it, together with the Commission's Guidelines on Temporary Exemptions under the SDA. For the reasons outlined below, the Commission has decided to refuse the application.

Inconsistent with the objects of the SDA

The first factor weighing against granting the exemption is that it is inconsistent with the objects of the SDA.

It is an object of the SDA to eliminate, so far as is possible, discrimination against persons on the ground of marital status in the provision of goods, facilities and services.²

The Applicants submit that it would be consistent with the objects of the SDA for the Commission to grant the exemption. The Applicants state that currently, certain groups of customers pay more for motor vehicle insurance than if their marital status were taken into account in their risk profile. The Applicants contend that this means that these groups are being adversely affected for a discriminatory reason.

The AADCQ and the NSWADB submitted that the exemption sought by the Applicants is inconsistent with the objects of the SDA because it would not address existing discrimination and will result in persons of some marital statuses being treated less favourably on the grounds of their marital status.

The Commission does not agree with the Applicants' submission that pricing insurance policies differentially based on marital status will redress existing discrimination. Currently, the Applicants do not take marital status into account when determining the price of motor vehicle insurance. Accordingly, no group is treated less favourably on the ground of their marital status in the provision of insurance.

The Applicants advise that if they determined the price of motor vehicle insurance policies on the ground of marital status, the majority of their customers, who describe themselves as married or cohabiting, would receive a small discount in the price of their insurance premium. Conversely, the rest of the Applicants' customers, who

² Section 3(b) SDA.

describe themselves as separated, divorced, single or widowed, would experience an increase in the price of their insurance policies.

The effect of the exemption proposed by the Applicants is that customers who are married or cohabiting³ would obtain a benefit. They would be treated more favourably than persons of a different marital status. However, customers who are separated, divorced, single and widowed would be treated less favourably than persons who are married or cohabiting. This is inconsistent with the object of the SDA of eliminating discrimination on the ground of marital status in the provision of services.

The Applicants submit that although the objects of the Act are clearly a relevant consideration when deciding whether to grant an application for an exemption under section 44 of the SDA, there is no specific requirement that an exemption must further the objects of the Act.

The discretion granted to the Commission under section 44 of the SDA is not expressly confined by the requirement that any exemption granted must be consistent with the objects of the SDA. The Commission notes that some courts and tribunals exercising their discretion under provisions similar to section 44 of the SDA in State anti-discrimination legislation have found that an exemption granted under anti-discrimination law need not promote the objectives of the legislation.

The cases that have considered section 44 of the SDA establish that whether an exemption furthers the objects of the SDA is a relevant consideration for the Commission to take into account.⁴ The Applicants accept that this is the case. For the reasons outlined above, it is a factor weighing against the granting of this application that it is inconsistent with the objects of the SDA.

Inconsistent the intention of Parliament

The second factor weighing against granting the exemption is that it would be inconsistent with the intention of Parliament for the Commission to grant the application.

The Applicants seek that the Commission grant an exemption that would allow them to discriminate in the provision of insurance on the ground of marital status providing that the discrimination is:

- based on actuarial or statistical data from a source on which it is reasonable for the Applicants to rely; and
- reasonable having regard to the data and any other relevant factors.

³ It should be noted that 'cohabitating' is not a marital status within the meaning of section 4 of the SDA. Whilst 'de facto spouse' is included within the definition of marital status, it should be noted that this term does not have the same coverage as the broader term 'cohabiting'. Particularly, the definition of de facto spouse in the SDA expressly excludes same sex couples. The Commission is not empowered under section 44 of the SDA to grant an exemption in relation to discrimination which is not unlawful under Division 1 or 2 or section 41(1)(e) of the SDA.

⁴ See *Re the Broken Hill Associated Smelters Pty Ltd and Human Rights and Equal Opportunity Commission* [1990] AATA 136. *Human Rights and Equal Opportunity Commission v Mount Isa Mines Limited* (1993) 118 ALR 80,

The exemption sought by the Applicants is very similar to that found at section 41 of the SDA which provides that discrimination in the provision of insurance on the ground of sex is not unlawful if the discrimination is based on actuarial data on which it is reasonable to rely and the discrimination is reasonable having regard to the data.

The Applicants argue that

It is consistent with the objectives and scheme of the Act to grant an exemption to the Applicants. The exemption sought fits well within the scheme of the existing exemption which reflect (sic) Parliament's intent to permit insurance companies to classify risks and set premiums in accordance with accepted actuarial practice. There is no reason to assume that Parliament intended that people deserved less protection on the basis of their sex than they should receive because of their marital status. Rather, it is more likely that Parliament was not conscious that there might be a different risk associated with different marital status.

The Applicants note that there are permanent exemptions in both the *Disability Discrimination Act 1992 (Cth)*⁵ and the *Age Discrimination Act 2004 (Cth)*⁶ relating to insurance. These exemptions provide that it is not unlawful to discriminate in the provision of insurance on the ground of age or disability if the discrimination is based on actuarial data on which it is reasonable to rely and which is reasonable having regard to the data and other relevant factors.

The Applicant submit that the very purpose of providing a mechanism for temporary exemptions is to 'catch' situations where Parliament has not turned its mind to whether an exemption is needed, but where it is appropriate to allow an exemption.

The NSWADB, the AADCQ and VEOHRC were of the view that the fact that section 41 of the SDA is limited to discrimination on the ground of sex is indicative of Parliament's intention that protection from discrimination in insurance should be confined to discrimination on the ground of sex.

There is nothing in the explanatory material to the SDA that indicates why section 41 was restricted to discrimination on the ground of sex and not extended to discrimination on the ground of marital status.

When the SDA commenced, section 41 contained the exemption relating to both superannuation and insurance. Section 41(1) provided that it was not unlawful to discriminate on the ground of sex or marital status in the terms or conditions appertaining to a superannuation or provident fund or scheme. Section 41(4) provided that it was not unlawful to discriminate on the ground of sex in the provision of insurance.

The Applicants speculate that marital status was not included in the exemption relating to insurance because Parliament did not contemplate that individuals of different marital statuses may perform differently in insurance. However, regardless of the reason for the omission, it is clear that at the time that section 41 was enacted, it was within the contemplation of Parliament that section 41 could have provided that discrimination in insurance on the ground of marital status was not unlawful. In

⁵ Section 46.

⁶ Section 37.

contrast to the provision relating to superannuation, Parliament expressly limited the exemption relating to insurance to discrimination on the ground of sex.

Parliament has amended the SDA on several occasions since its commencement in 1984. Particularly, in 1991 the section 41 which referred to both insurance and superannuation was repealed and a new provision, dealing only with insurance, was inserted. In 1992, Parliament amended section 41 to insert sections 41(e) and 41(1A) which require an insurer to provide actuarial data to a client if a client makes a written request for that data.

In 2008 the Senate Legal and Constitutional Affairs Committee conducted an inquiry into the effectiveness of the SDA. The Committee reported to Parliament in December 2008. The Committee examined the permanent exemptions in the SDA in detail and made no specific recommendations about section 41 of the SDA.

Parliament has had several opportunities over time to amend section 41 of the SDA to include a reference to marital status but has elected not to do so. If the Commission granted an exemption in the terms sought by the Applicants, it would have the same effect of as the permanent exemption contained in section 41 were extended to cover discrimination in insurance on the ground of marital status. The Commission is of the view such an exemption would not be consistent with the intention of Parliament and should not be granted.

Concerns about the actuarial data

The third factor weighing against granting the exemption is that the Commission has concerns about the tendency of the data produced by the Applicants to support its contention that there is a difference in performance in insurance based on marital status.

The Applicants contend that persons who are married or cohabiting have a lower claims ratio than average and persons who are separated, divorced, single or widowed have a higher claims ratio than average. In support of this claim they have provided a number of expert reports and a significant amount of actuarial data.

The Applicants ask customers to nominate their marital status at the time that they purchase an insurance policy. However, an individual's marital status may change from the time that they purchase insurance to the time that they make an insurance claim.

The Applicants advise that under their Product Disclosure Statement (PDS) customers are required to inform them if the details contained in their insurance policy are not correct, or if there is a material change in their details. The Applicants advise that the PDS forms part of the terms and conditions on which the Applicants agree to provide insurance to their customers. The Applicants advise that from 1 May 2009 until 30 April 2010, approximately 3% of its customers advised of a change in their marital status.

The Applicants PDS states

When you renew, extend, vary or reinstate your insurance – you must disclose every matter that you know or could reasonably be expected to know, is relevant to us in deciding whether to insure you.

In the absence of specific advice, it is unclear that consumers would know, or could reasonably be expected to know, that their marital status is relevant to the Applicants' decision whether to insure them. Further, the Applicants advise that they do not confirm an individual's marital status at the time that a claim is made because it does not affect the Applicants' decision whether to accept a claim. Thus if a customer's marital status was incorrectly recorded in their insurance policy or had changed since the policy was purchased, the insured may not advise the insurer of the change in his or her details because they would not appreciate that this information is relevant to the insurer.

The Applicant relies on individuals to accurately describe their marital status. The Applicant does not provide guidance to customers about the meaning of particular marital statuses because they claim that the relationship statuses that they have referred to have a commonly understood meaning that does not require further explanation.

It does not appear that all of the relationship statuses used by the Applicants have as clear a meaning as the Applicants claim them to have. For example, persons who are divorced, separated, cohabiting or widowed may describe themselves as single. Further, if customers learn that the Applicants price insurance policies according to marital status, they may describe themselves by a marital status that is equally open to them but will be charged less for insurance, for example separated people may describe themselves as married and divorced people may describe themselves as single. Where a relationship cannot be verified by legal documentation, it is unclear how the Applicants would accurately determine an insured's marital status.

The applicants have provided material that suggests that there is a connection between marital status and the likelihood of making a motor vehicle insurance claim. However, as outlined above, there are some factors which cast doubt on the tendency of the data to support a connection between marital status and the likelihood of making a motor vehicle insurance claim. These factors weigh against the granting of the exemption.

Conclusion

The Applicants request that the Commission grant an exemption to them so that they may price insurance policies more profitably and thereby obtain a commercial advantage. The Applicants note that if they were allowed to price insurance policies according to marital status the majority of their customers, who describe themselves as married or cohabiting, would obtain a discount in the price of their motor vehicle insurance.

For the reasons outlined above, the Commission is of the view that the considerations advanced in favour of granting the exemption are outweighed by the considerations that favour refusal of the exemption. The Commission has therefore decided that the exemption sought by the Applicants is not reasonable and has refused the application.

APPLICATION FOR REVIEW

Subject to the *Administrative Appeals Tribunal Act 1975* (Cth), any person whose interests are affected by this decision may apply to the Administrative Appeals Tribunal for a review of the decision.

Dated this 8th day of May 2012.

A handwritten signature in black ink, appearing to read 'C Branson', written in a cursive style.

Signed by the President, Catherine Branson QC, on behalf of the Commission.