



One Company
Many Brands



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1 February 2012

Assistant Secretary
International Human Rights and Anti-Discrimination Branch
Attorney General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

By email antidiscrimination@ag.gov.au

Dear Assistant Secretary

RE: CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS DISCUSSION PAPER

I refer to the *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (the Discussion Paper). Suncorp welcomes the opportunity to contribute to the discussion.

The Suncorp Group

Suncorp Group Limited and its related bodies corporate and subsidiaries (collectively 'Suncorp') offers a range of financial products and services in banking (Suncorp Bank), general insurance, life insurance and superannuation (Suncorp Life) across Australia and New Zealand. Suncorp has around 16,000 employees located across Australia and relationships with over nine million customers.

Suncorp offers general insurance products through our mass brands: GIO, Vero, Suncorp, AAMI and our niche brands: Apia, Shannons, CIL Insurance, InsureMyRide, Bingle and Just Car Insurance. Suncorp Life products are distributed direct to customers through mass market brands Apia, AAMI, GIO and Suncorp and Million Dollar Woman, as well as our through Financial Advisers under our brands Asteron Life and Guardian Advice.

This submission is made on behalf of Suncorp.

The Discussion Paper

Suncorp commends and supports the Attorney-General Department's initiative to explore opportunities to improve the effectiveness of the federal anti-discrimination laws. The initiative involves creating greater clarity and consistency by consolidating the existing framework of the:

- *Racial Discrimination Act 1975* (RDA);
- *Sex Discrimination Act 1984* (SDA);
- *Disability Discrimination Act 1992* (DDA),
- *Age Discrimination Act 2004* (ADA);
- *Australian Human Rights Commission Act 1986* (AHRC Act); and
- *Fair Work Act 2009* (where relevant).

The aim of the exercise is to simplify the current significant differences in the drafting and coverage of protections under each act into a single comprehensive law. There is no intention to diminish any current protections but rather to clarify through simplification. Suncorp supports these objectives.

The Discussion Paper specifically covers:

- the meaning of discrimination;
- protected attributes;
- protected areas of public life;
- exceptions and exemptions
- the complaints and compliance framework; and
- the interaction with other laws, application to State and Territory Governments.

The general and life insurance industries have lodged submissions (through the Insurance Council of Australia and the Financial Services Council) in response to this Discussion Paper and Suncorp generally supports these submissions. Suncorp wishes to add to those submissions.

Meaning of Discrimination

In respect to the burden of proof, Suncorp supports the approach of the complainant bearing the burden of proof in any allegation of discrimination. Suncorp is not aware of any compelling empirical evidence that supports a change to the existing burden of proof approach.

Proving one's innocence is inherently unfair. It means resources have to be expended defending even vexatious claims. Further, the laws should sit together coherently. It would not make sense to require a respondent to prove its innocence in discrimination cases, where the applicant would have to prove the respondent's guilt in most other cases, such as unfair dismissal cases.

Suncorp takes any complaint in regards to discrimination seriously and utilises its complaints handling processes governed by the *Fair Work Act 2009*, *Corporations Act 2001*¹ and Australia Securities and Investment Commission Regulatory Guide 165. In the general insurance division, it is unusual to receive complaints in relation to discrimination. Only three have been lodged through the internal dispute resolution process in the last 8 years relating to underwriting.

For the remainder of the chapter on the meaning of discrimination in the Discussion Paper, Suncorp expresses no particular view. However, there is a preference that whatever view is adopted the regulatory burden on businesses to comply with the obligation should be considered and reduced where possible without diminishing the stated protections.

It is important that uncertainty and ambiguity be avoided, as far as possible, in whatever approach is taken. The focus should be on delivering targeted, cost effective procedures which aid compliance with anti—discrimination laws.

Protected Attributes

The Discussion Paper has asked whether, among other things, criminal record is an attribute which should be protected. As a national employer, Suncorp is of a view that certain ambiguities would need to be clarified before such a protection is included in a consolidated Act. Further, the financial services industry has a regulatory obligation to check criminal history of its employees.

For example, are *all* criminal records to be beyond employer scrutiny? The *Australian Human Rights Commission Act 1986* (AHRC Act) provides for a limited cause of action for criminal record (investigation and consent conciliation only). The relevant employer defence is that a person cannot meet the inherent requirements of the role given their conviction. This is quite a high threshold given that many convictions will be informative of a person's general character, but will not prevent them from meeting the *inherent* requirements of their role.

If only 'irrelevant' criminal records are to be covered (as is the case in several jurisdictions), the question becomes one of determining which records are 'irrelevant.' Is it limited to only those which are irrelevant to the actual job, or can convictions going to broader considerations such as character be treated as relevant? Clarity is sought in this regard.

¹ Chapter 7, *Corporations Act 2001* (Cth)

Suncorp believes that the whole regulatory impact should be assessed to understand the practical outcomes of introducing such protections.

Protected Areas of Public Life

Specified areas of public life in which discrimination and harassment are prohibited generally extends to such activities as hiring and firing in employment, education, provision of goods and services and the administration of Commonwealth laws and programs.

The following comments are offered from the perspective of Suncorp's business operations in the provision of goods and services. For banking products, Suncorp Bank adheres to amongst other things, the principles and obligations stated in the:

- *National Consumer Credit Protection Act, 2009 (Cth)*; and
- Code of Banking Practice.

Suncorp Bank also adheres to its own internal Bank Credit Risk and Credit Recovery policies. The principles of these policies are aligned with the Bank's legal and commercial requirements. It is essential that Suncorp Bank be permitted to continue to conduct its business on a lawful and commercial basis.

In respect to the provision of general and life insurance products to protected groups, Suncorp relies on the comments advanced below under the exceptions and exemptions paragraph.

Suncorp generally supports the current vicarious liability provisions, particularly the three elements of vicarious liability namely:

- the existence of a specified relationship;
- sufficient connection between the relationship and the unlawful act, and
- the defence of reasonable preventative action has not been established.

Suncorp submits the test for sufficient connection between the relationship and the unlawful act should be 'within the scope of authority' rather than 'within the scope of the person' actual or apparent authority' or 'in connection with' the person's employment or duties as an agent. For the defence to apply, Suncorp further submits the defence should be based upon 'reasonable preventative steps' having been taken rather than 'all reasonable steps.'

Exceptions and Exemptions

Suncorp strongly supports the insurance industry view that any consolidation of the anti-discrimination legislation should continue to provide a specific insurance exemption clause rather than the proposed general limitations clause. Suncorp believes that the current exemptions are appropriate and reflect industry practice.

To understand the basis of Suncorp's view, it is necessary to understand the core principles of privately underwritten insurance, and subsequently, the value of a healthy and robust insurance industry to the national economy as well as the community safety and health benefits.

Australia's insurance industry operates on a fully funded profit basis and operates in a highly regulated environment, supervised by multiple regulators, governing the industry's prudential obligations, financial services licensing and general market compliance.

In simple terms, insurance is a promise where many people pay a small price (the premium) to form a pool of money from which amounts are paid to alleviate the burden of misfortune that falls upon a few (the loss). Individuals that suffer a loss (financial or otherwise) from a prescribed event have an "insurable interest" to the extent of that loss.

Insurers are obliged to evaluate the likelihood that a loss that will occur for a given risk. Any factor that causes a greater likelihood of loss normally is charged at a higher rate. Not only is this basic principle essential for insurers to remain solvent, it also encourages behavioural changes to mitigate the risk.

Insurers use the underwriting process – statistical, actuarial and other relevant factors – to assess the frequency and severity of the insured peril and the expected average payout resulting from these perils as part of the pricing process for a policy.

Thus selection against a potential group of customers, when pricing risk is a fundamental aspect of the underwriting process. For instance, motor insurance premiums are based on a wide range of factors including location of risk, type of vehicle, age of vehicle, as well as gender and age of the driver. The rationale for the differential treatment of potential groups of customers goes to the heart of pricing risk and offering products that are affordable.

The current insurance exemption enables the insurance industry to lawfully discriminate based on the underwriting process. This is vital to enable the insurance industry to price risk appropriately and develop product offerings that are affordable as well as meeting the demands of the market and obligations to its shareholders and regulators.

Suncorp supports the current insurance exemption clause as it creates legal certainty and assists in developing product offerings from which the community may benefit.

Suncorp does not support the a general exemption clause, based on the fact that the lack of guiding rules as to when the insurance industry may lawfully discriminate is most likely to lead to increased litigation to settle the rules. The number of complaints about discrimination lodged through internal dispute resolution process is low (three complaints in eight years) suggesting the current statutory insurance exemption accurately reflects insurer practice and assists insurers to explain the underwriting process to consumers, aiding early resolution of complaints.

Any increase in litigation would ultimately be borne by the consumer, putting an upward pressure on premiums. Hence Suncorp strongly supports maintaining a specific insurance exemption clause.

An example of an effective insurance exemption clause is Section 47 of the *Equal Opportunity Act 2010 (Vic)* which states inter alia:

An insurer may discriminate against another person by refusing to provide an insurance policy to the other person, or in the terms on which an insurance policy is provided, if-

- the discrimination is permitted under the
 - *Sex Discrimination Act 1984 (Cth)*; or
 - *Disability Discrimination Act 1992 (Cth)*; or
 - *Age Discrimination Act 2004 (Cth)*; or
- the discrimination
 - is based on actuarial or statistical data on which it is reasonable for the insurer to rely; and
 - is reasonable having regard to that data and any other relevant factors; 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 factors.

For the purposes of the above insurance exemption clause, the following definitions are provided:

- ‘insurance policy’ includes a annuity, a life insurance policy, an accident insurance policy and an illness insurance policy; and
- ‘insurer’ means a person who is the business of providing insurance policies.

Complaints and Compliance Framework

Suncorp believes in timely, targeted and cost effective mechanisms to resolve disputes. Compulsory or voluntary conciliation or mediation, with the option of proceeding to the Federal Court if the parties are not able to resolve their differences, is in Suncorp’s view an appropriate way to achieve this. Suncorp supports the current process of permitting representative actions at the conciliation or mediation stage but not at the Federal Court level.

However, it is submitted that telephone conciliation should be introduced, as it can promote resolution by enabling the parties to quickly get together and seek a mutually agreeable outcome. It also reduces legal costs as employee relations advisors, witnesses and lawyers (if any) do not need to travel to court to mediate.

Suncorp opposes the proposal that each party bear their own costs in a litigated matter but rather supports the current position that an unsuccessful party generally be required to pay the costs of the successful party. Suncorp has real concerns that a change to 'each party pay its own costs' would encourage unmeritorious claims to be pursued. Further, it may encourage innocent parties to settle to avoid incurring costs, rather than a settlement being based upon the merits of the case.

Government guidelines such as the Fair Work Ombudsman Best practice Guides are of great benefit in clarifying the operation of the relevant laws. Suncorp would support similar guides being produced to assist businesses in understanding their obligations.

If any changes are made to the way the AHRC functions, it is submitted that it should remain impartial. For example, if a discrimination ombudsman is introduced, this should be separate from the AHRC, as is the case currently between the Fair Work Ombudsman and Fair Work Australia.

Interaction with Other Laws, Application to State and Territory Governments

As a national employer, Suncorp has not experienced an example of employee making both an anti-discrimination and Fair Work Act claim for the same matter, however, there is potential to do so. This ability should be reduced to ensure that employees do not 'double dip.'

We recommend the Commonwealth law should cover the field in discrimination legislation. This would simplify the regime and reflects the increasing popularity of the 'adverse action' cause of action for applicants who allege workplace discrimination. In order to reduce complicated and protracted claims, the applicants should be required to make an election between the anti-discrimination jurisdiction, the Fair Work Act and common law claims for negligence.

In respect to current exemptions for direct compliance with other State or Territory laws, Suncorp expresses no view on the options offered.

General Comments

Suncorp supports the general intent of the Discussion Paper to clarify, simplify and provide greater consistency of the current Commonwealth antidiscrimination laws and to consolidate the laws into a single comprehensive law without diminishing the current protections. Reducing the regulatory burden in complying with the laws is a necessary component of this review.

Australia's banking and insurance business represents a vital part of Australia's economy. Suncorp – with its banking and insurance and investment operations - is a top 25 ASX listed company with over \$95 billion in assets.

At its core, insurance is - by its very nature - discriminatory and the ability to lawfully discriminate underpins the economic viability of the insurance industry. This similarly applies to the delivery of banking services in accordance with responsible lending principles.

Specific exemptions are required to ensure the banking and insurance sector is able to continue to conduct their businesses responsibly, lawfully and with certainty.

Conclusion

Suncorp wants to work collaboratively with the Attorney General's Department to facilitate the consolidation of existing anti-discrimination laws. It is also timely to consider the regulatory burden on businesses in complying with the antidiscrimination obligations and to seek delivery of a reduction in that burden at every opportunity.

Providing greater consistency in the application of the antidiscrimination laws nationally would also assist in achieving in creating greater clarity and reducing the regulatory burden on businesses without diminishing the protections. Suncorp is eager to discuss our submission or any other matter relating to this Discussion Paper with you.

Yours faithfully

Annabelle Butler
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