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European court rules that gender can't be used to price insurance premiums

The European Court of Justice recently ruled that the use of gender as a rating factor in the pricing of insurance premiums and benefits is contrary to the principle of equal treatment between men and women under European Union law.

Exemptions that have entitled insurers to derogate from the principle of equal treatment will no longer be valid from 21 December 2012. This decision will mean insurers operating in the European Union member states of Belgium, France, Germany, Ireland, Italy, the Netherlands, Spain and the United Kingdom will need to change underwriting practices, and review current systems and pricing models.

Some commentators have already flagged significant hikes in motor insurance premiums for women and falls in the cost of life insurance for men. Others have signalled that such changes will force insurers to adopt technologies and systems that allow them to price an individual's risk more accurately.

The decision raises some interesting questions for insurers in Australia that have operated with the benefit of similar type exemptions under the various Federal and State and Territory based anti-discrimination legislation. Would such a case be likely to succeed in Australia?

Background

The European Union Directive 2004/113 prohibits discrimination on the grounds of gender in the access to, and supply of, goods and services (Gender Directive). This reflects the principle of the right to equality before the law and protection against discrimination as recognised in a number of international conventions including the Universal Declaration of Human Rights and the

WHO DOES THIS AFFECT?

All insurers operating in the European Union.

HIGHLIGHTS

The European Court of Justice has ruled that gender cannot be used to determine pricing for insurance policies

As Australian law has many similarities with European law, insurers will be closely watching the developments

The market will be closely monitoring changes in insurance premiums based on gender.

International Covenant on Civil and Political Rights.

However, in recognition of the widespread use of actuarial factors related to gender in the provision of insurance, Article 5(2) of the Gender Directive permitted member states to provide an opt out for insurers to use gender as a risk factor in the calculation of premiums based on relevant and accurate actuarial and statistical data. The Gender Directive also required member states to review those opt out arrangements within a specified time period.

The Association Belge des Consommateurs Test - Achats Case¹ began as an application in the Belgian Constitutional Court seeking an annulment of Article 10 of the Law of May 2007 (which is part of the Belgium state law enshrining the Gender Directive). Article 10 provides an opt out as foreshadowed by Article 5(2) of the Gender Directive. Article 10 permits a 'direct proportionate distinction ... on the basis of gender for the purposes of calculating insurance premiums and benefits where sex is a determining factor in the assessment of risk on the basis of relevant and accurate actuarial and statistical data.'

The applicants claimed that Article 10 was contrary to the principle of equality between men and women. As the action raised an issue concerning the validity of an EU directive, the Belgium Constitutional Court referred the question to the European Court of Justice for a preliminary ruling.

The European Court agreed with the applicants. It found that Article 5(2) permitted the derogation from the principle of equality to persist indefinitely because it imposed no temporal limitation on the opt out provisions implemented by member states. This failure to limit the operation of the exemption undermined the objective of equal treatment between men and women - the purpose of the Gender Directive.

The European Court ruled that insurers must apply unisex premiums and benefits with effect from 21 December 2012.

The Reaction

The impact of the decision will be widespread in the EU and will mean some significant changes in underwriting practice for insurers. For example, it has been common practice for insurers to charge young men significantly more for motor insurance as they are statistically more likely to have serious accidents than young women.

Simply taking gender into account to underwrite risk will no longer be permitted. Insurers will need to demonstrate that underwriting decisions have been based on non-gender specific factors otherwise they will be in breach of the Gender Directive.

¹ Case C-236/09 Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres 1 March 2011. A copy of the judgement available at <http://curia.europa.eu/jurisp/cgi-bin>

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Many argue this will mean higher premiums. For example, women drivers will end up cross-subsidising young male drivers. Others in favour of the decision say that gender should not be the basis for underwriting decisions. Even if women drivers are considered safer drivers, why should a man with a good driving record be punished by paying more for his insurance because of gender? In the case of life insurance, why should a woman who has a poor health profile benefit from the fact she is female in the pricing of her life insurance policy?

Does this case illustrate that idealists have won the day, or does it signal the end of 'lazy' underwriting practices based on stereotypical and outdated gender based biases? The jury is out for now.

What is clear is that insurers will have to build more sophisticated underwriting models and take greater account of an individual's risk profile in the pricing of policies. Pricing models will need to be reviewed and updated. We might also see a greater uptake of technologies such as driver tracking systems in the field of motor insurance to allow for greater individualisation of pricing risk.

No commentator has been brave enough to suggest that this decision will generally lead to lower premiums for a greater number of people. Some are suggesting that it might even discourage some groups from taking out insurance in the face of significantly higher premiums where they had previously benefited from a lower pricing bias based on gender.

What does it mean for Australian insurers?

The decision does not directly impact on insurers operating in the Australian market. However, the shift in underwriting practices and statistical analyses in the EU will no doubt filter through to this market and innovate existing underwriting practices. Over time, this may improve the accuracy and efficiency of pricing techniques.

There is a wide range of federal, state and territory-based anti-discrimination legislation in Australia. Insurers have had the benefit of similar exemptions under the anti-discrimination legislation that permit them to discriminate between insureds on the basis of gender,² disability³ or age⁴ without breaching the law.

While each exemption is structured slightly differently under the legislative framework the exemptions generally operate so that discrimination on the basis

2 For example, see section 41, Sex Discrimination Act 1984 (Cth)

3 For example, see section 46, Disability Discrimination Act 1992 (Cth)

4 For example, see section 37, Age Discrimination Act 2004 (Cth)



of age, gender or disability will not be held to be unlawful if it is:

- based on actuarial or statistical data from a source on which it is reasonable for the insurer to rely
- is reasonable having regard to the data, or
- in circumstances where no such data is available, the insurer can show that the discrimination is reasonable having regard to other relevant factors.

The question of what might be reasonable in this context has been considered by the Australian courts.⁵ In the context of anti-discrimination the test is less demanding than one of necessity but more demanding than one based on convenience. The test is an objective one that requires the weighing up of the nature and extent of the discriminatory effect against the reasons advanced as to why it is appropriate in any particular circumstance.

This test of reasonableness suggests a higher threshold under Australian laws than was the case under EU laws where an insurer only had to establish that the actuarial data on which the calculations were based was relevant, reliable, regularly updated and available to the public.⁶

Action for insurers

While at this point, this decision does not have direct application to insurers in the Australian market, it signals an interesting development in the way in which a court has interpreted a universal human rights principle. Insurers need to continue to monitor trends and issues in Europe.

In Australia, insurers who do use gender, age or disability as a risk factor in the calculation of premium and benefits need to continue to ensure that the basis for gender, age or disability differentiation is based upon actuarial or statistical data on which it is reasonable to rely and is reasonable in the circumstances of the particular individual and having regard to the data.

It is important that such data is regularly assessed and confirmed as current and accurate and that underwriting guidelines emphasise the significance of the discriminatory effect against an individual's particular circumstance.

⁵ See for example *QBE Travel Insurance v Bassenelli* [2004] FCA 396 and *Secretary Department of Foreign Affairs and Trade v Sykes* (1989) 23 FCR 251

⁶ We have not reviewed every opt out provision of the EU member states but note that Article 5(2) of the Gender Directive permits proportionate differences for an individual's premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. There is no requirement to demonstrate 'reasonableness' in the individual circumstances.

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