

# BCNA submission to Productivity Commission Inquiry on Disability Discrimination Act (DDA)

1. One of the difficulties experienced by people seeking insurance is how to obtain information about the basis of an insurer's decision to refuse to grant a policy or to grant on conditions or with exclusions.
2. Section 46 of the DDA contains an exemption for insurers in particular circumstances.
3. Section 46 was discussed by Mansfield J in the Federal Court decision of *QBE Travel Insurance v Bassanelli* [2004] FCA 396 page 9 (7 April 2004) *The terms of s 46 and its place in Div 5 dealing with exemptions indicates that it provides for an excuse or ground of exclusion which assumes the existence of the grounds upon which liability for discrimination exists. It provides for the avoidance of that liability if additional or special facts are proven. They are facts which are likely to be within the special knowledge of the insurer. The reasons for the insurer's discriminatory conduct are the focus of its attention. Consequently, there are sound reasons for placing the burden of proof on the insurer seeking to rely upon the additional or special facts: see per Dixon CJ, McTiernan, Webb, Fullager and Kitto JJ in Vines v Djordjevitch at 519. See also Waters v Public Transport Commission (1991) 173 CLR 349 (Waters); Clarke v Catholic Education Office [2003] FCA 1085 at [5]*
4. As currently drafted, there is no obligation on an insurer to provide a statement of reasons where the insurer wishes to invoke the exemption. Accordingly a consumer is hard pressed to make an assessment of whether the insurer has acted lawfully.
5. BCNA submits that Section 46 should be amended to provide that
  - The exemption is conditional upon the insurer providing to the consumer a statement of reasons set out in a clear and meaningful manner and in sufficient detail so that it is clear on the face of the statement whether the exemption applies.
  - Where the insurer based its decision on reports, studies or manuals then copies of such documents must be included in the statement
  - Where the insurer relies on other relevant factors under Section 46 (f)(ii) the details of such other relevant factors must be included in the statement.
  - Where the insurer wishes to rely on Section 46(1) (g) , the insurer must in addition to the above
    - set out the process that the insurer has followed to determine whether there is any actuarial or statistical data on which it is reasonable to rely ;and
    - the other relevant factors that the insurer has relied upon.
  - The insurer will be limited to the statement of reasons provided to the consumer in any action under the DDA.
6. Section 107 is currently limited to Section 46 (1)(f)(1). BCNA submits that Section 107 should be amended to reflect all parts of Section 46 eg
  - any other relevant factors that the insurer has relied upon ;
  - where the insurer wishes to rely on Section 46(1) (g) ,the process that the insurer has followed to determine whether there is any actuarial or statistical data on which it is reasonable to rely.
7. Section 107 should be further amended to reflect the provisions of Section 75 of the Insurance Contracts Act, allowing the insured to request the information directly from the insurer.