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Investment & Financial Services Association Ltd  
ACN 080 744 163

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General Manager  
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Australian Competition & Consumer Commission  
PO Box 1199  
DICKSON ACT 2602

By mail and email: [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)

Dear Sir

**Application for revocation and substitution  
Authorisation Nos: A90857 and A90869**

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Attached is Investment and Financial Services Association (IFSA) application for revocation and substitution of Authorisation No.s: A90857 and A90869.

In December 2003, the Commission granted authorisation in respect of IFSA's application for the revocation and substitution of authorisation no.s A30200 and A30201, with an extension of the authorisation to 25 December 2005. The authorisation was granted on 3 December 2003.

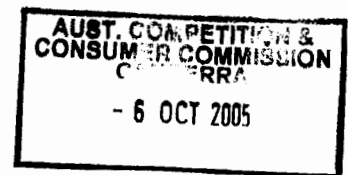
At the time, it was anticipated that the Government would have responded to recommendations in the written report arising from the inquiry into genetic information privacy and discrimination issues. In making this application, IFSA considers that the public benefits far outweigh the costs in terms of any potential decreased competition and possibly slightly higher premiums and that there is a considerable net public benefit.

In the circumstances, IFSA would like to apply for the revocation and substitution of authorisation no.s A90857 and A90869, by way of an extension of the authorisation for a further period of time. IFSA would also like to apply for an interim authorisation for the extended period of time, pending on the timing of the Commission's final determination.

Annexure 1 provides a list of IFSA members and market share details in support of the application.

Yours faithfully,

David Micó  
Senior Policy Manager



## **ANNEXURE 1 - Life Insurance member companies of IFSA and their market share**

The industry regulator Australian Prudential Regulation Authority on its website [www.apra.gov.au](http://www.apra.gov.au) as at the 26 September 2005 lists 37 registered life insurance companies. Of these 37 APRA registered life insurers, IFSA represent 34, which are recorded below.

Based on the DEXX&R's LIFE ANALYSIS report published in August 2005, IFSA members account for 99.15% of new sales of individual life insurance & trauma policies excluding income protection sales for the year ending 31 March 2005. The top 10 accounted for 88.02% of the market share which are made up of the following registered insurers or group of insurers:

17.38%	Colonial Mutual/Commonwealth Life
13.14%	AMP Life Limited
9.54%	Tower Australia Limited
9.25%	BT /Westpac Life
9.20%	MLC /National Australia Financial Management Limited
8.60%	National Mutual Life Association (AXA/AC&L)
7.90%	ANZ Life Limited /ING Life Limited
5.18%	Asteron
4.05%	Norwich Union Life Australian Limited
3.79%	Zurich Australia Limited

### **IFSA Members - Registered Life Insurers**

- American International Assurance Company (Australia) Limited
- AMP Life Limited
- ANZ Life Assurance Company Limited
- Asteron Life Limited
- BT Life Limited
- Challenger Life Limited
- Challenger Life No 2 Limited
- Colonial Mutual Life Assurance Society Limited (The)
- Commonwealth Insurance Holdings Limited

- Commonwealth Life Limited
- Cuna Mutual Life Australia Limited
- General Reinsurance Australia Ltd
- Hallmark Life Insurance Company limited
- Hannover Life Re of Australasia Limited
- ING Life Limited
- IOOF Life Ltd
- Macquarie Life Limited
- MBF Life Limited
- MetLife Insurance Limited
- MLC Lifetime Company Limited
- MLC Limited
- Munich Reinsurance Company of Australasia Limited
- National Australia Financial Management Limited
- National Mutual Life Association of Australasia Limited
- Norwich Union Life Australia Limited
- NULIFE Insurance Limited
- PrefSure Life Limited
- RGA Reinsurance Company of Australia Limited
- St George Life Limited
- Suncorp Life & Superannuation Limited
- Swiss Re Life & Health Australia Limited
- Tower Australia Limited
- Westpac Life Insurance Services Limited
- Zurich Australia Limited

**Application for revocation and substitution of authorisation**  
**(Section 91C of the *Trade Practices Act*)**

**Investment and Financial Services Association**

**1. Background**

- 1.1 On 30 August 1999, the Investment and Financial Services Association ("IFSA") lodged applications for authorisation (A30200 and A30201) with the Australian Competition and Consumer Commissioner ("Commission") in relation to its draft policy on genetic testing.
- 1.2 IFSA is an industry association that represents the retail and wholesale funds management and life insurance industries. IFSA's current life insurance members account for in excess of 98% of the life insurance industry business written in Australia.
- 1.3 The draft policy sought to be authorised was a proposed agreement by IFSA's members that they will not require applicants for life insurance to undergo genetic testing and will not induce applicants to undergo such testing by offering discounts off standard premium rates based on favourable test results.
- 1.4 Without authorisation, IFSA and its members would be at risk of legal action under the anti-competitive provisions of the *Trade Practices Act* because clauses 2 to 9 of the draft policy might constitute exclusionary provisions (within the meaning of sections 4D and 45 of the Act).
- 1.5 At the pre-decision conference held by the Commission on 17 July 2000 at the request of the Australian Medical Association ("AMA"), the AMA advised that in the absence of legislation to address genetic testing confidentiality and privacy issues, it supported IFSA's self-regulatory approach but considered that the draft policy required further development in consultation with relevant parties.
- 1.6 Further submissions from interested parties were then received by the Commission, strongly supporting the public benefits of preventing both insurer-initiated genetic testing and the use of genetic tests as the basis of offering discounts off standard life insurance premiums.
- 1.7 On 9 August 2000, the Government announced that the Australian Law Reform Commission and the National Health and Medical Research Council are to inquire jointly into human genetic information privacy and discrimination issues. As stated in the Commission's decision dated 21 November 2000:

*"The Commission welcomes the proposed Government inquiry into human genetic information privacy and discrimination issues. In the Commission's view, there is public benefit in an orderly and detailed evaluation and debate concerning the regulatory safeguards that are appropriate in this area, including consideration of whether or not industry self-regulation is adequate in respect of the issues involved."*

- 1.8 IFSA subsequently amended its application to seek authorisation only in respect of clauses 2 and 4 of its draft policy.
- 1.9 After further consideration of the application (including receipt of further submissions from IFSA, consumer groups, government agencies and health professional organisations), the Commission was satisfied that ensuring IFSA's life insurer members do not require applicants for insurance to undergo genetic testing, and that applicants will not be indirectly influenced into undergoing such tests, is likely to result in benefit to the public.

1.10 On 21 November 2000, the Commission granted authorisation in respect of the proposed clauses 2 and 4 of the draft policy on genetic testing decision. Pursuant to section 91(1), the authorisation was granted until 13 December 2002.

1.11 At paragraph 8.17 of the Commission's decision, the Commission noted:

- the anticipated rapid advances in gene technology over the next few years;
- likely further development of self-regulatory and legislative safeguards concerning the use of such technology.

1.12 It was in light of these anticipated developments that the Commission decided to limit the authorisation to a period of 2 years (that is, to 13 December 2002).

1.13 The Commission stated:

*"Should IFSA wish to retain the advantage of authorisation for these clauses under the Act, it will at that time have to satisfy the Commission that the clauses are likely to continue to result in net public benefit."*

1.14 On 21 November 2002, the IFSA lodged applications for revocation and substitution of authorisation (A30200 and A30201) with the Australian Competition and Consumer Commissioner ("Commission") in relation to clauses 10.1 and 10.3 of its policy on Genetic Testing Policy

1.15 On 10 December 2002, the Commission granted IFSA interim authorisation in respect of clauses 10.1 and 10.3 of IFSA's Genetic Testing Policy

1.16 On 8 October 2003, the Commission released its Draft Determination (A90857 and A90869) in respect of Clauses 10.1 and 10.3 of IFSA's Genetic Testing Policy. The Commission in the determination stated:

*"The Commission continues to accept that a public benefit results from life insurers not coercing individuals to undergo genetic testing."*

And

*"Overall, the Commission considers that the public benefit flowing from the proposed arrangements are likely to outweigh the anti-competitive detriment"*

1.17 On 3 December 2003, the Commission made its determination which came into force on 25 December 2003 for a period of 2 years on IFSA's application for revocation and substitution for authorisation (A90857 and A90869) in relation to clauses 10.1 and 10.3 of its Genetic Testing Policy. The authorisation applying to 25 December 2005.

## **2. Inquiry – "Protection of Human Genetic Information"**

2.1 In accordance with Terms of Reference dated 5 February 2001, the Australian Law Reform Commission and the Australian Health Ethics Committee are required to inquire and report into issues relating to:

- (a) whether, and to what extent, a regulatory framework is required:
  - (i) to protect the privacy of human genetic samples and information; and
  - (ii) to provide protection from inappropriate discriminatory use of human genetic samples and information; and
  - (iii) to reflect the balance of ethical considerations relevant to the collection and uses of human genetic samples and information in Australia; and
- (b) any related matter.

- 2.2 In performing their functions in relation to the reference, the Commission and the Committee are required to have regard to a number of issues, including:
- (a) the rapid advances in human genetic technology including progress of research towards the mapping of the human genome;
  - (b) the scientific and medical applications of human genetic information which are, or could be, of benefit to the Australian community; and
  - (c) evidence of, and the potential for, the inappropriate use or application of human genetic information.
- 2.3 The Terms of Reference required a final report to be provided to the Attorney-General and the Minister for Health and Aged Care by 30 June 2002.
- 2.4 After an issues paper was released on 14 November 2001, the inquiry conducted 15 public forums around Australia, held in excess of 100 meetings with interested parties and received 168 written submissions.
- 2.5 On 28 August 2002, a consultation paper, "*Protection of Human Genetic Information*" was released, containing 105 draft proposals and 40 further questions, to form the basis of further national consultation before the completion of the final report. The release of the paper followed an 18 month inquiry into the protection of human genetic information.
- 2.6 One of the draft proposals made in the consultation paper is that an independent body, the Human Genetics Commission of Australia ("HGCA"), be set up to advise governments on emerging genetics issues.
- 2.7 The report "*Essentially Yours*" (ALRC 96) from the inquiry undertaken by the Australian Law Reform Commission and the National Health and Research Council regarding the protection of human genetic information was handed down in May 2003. ALRC96 makes recommendations that are wider than IFSA's genetic testing policy.
- 2.8 At present, the Government has not responded to the ALRC 96 other than the announcement by the Treasurer in May 2005 budget new funding of \$7.6 million over four years from 2005-06 to establish an independent expert advisory body "Human Genetics Advisory Committee" (HGSA). This advisory body is to be a principal committee of the National Health and Medical Research Council (NHMRC).
- 2.9 The Treasurer's May 2005 announcement signals that the government's intention is to have an advisory body (HGSA) and not a commission (HGCA) as recommended in ALRC96.
- 2.10 In relation to the use of genetic information in the area of insurance, the following recommendations were included in ALRC 96 implementation schedule for IFSA (page 89):

Recommendation 27-2: Develop mandatory policies for their members to ensure that, once the HGCA has made a recommendation in relation to the use of a particular genetic test in underwriting, that test is used by members in underwriting only in conformity with the recommendations of the HGCA

Recommendation 27-3: Require members to state, on relevant insurance application forms, that not all genetic test results have to be disclosed and that applicants may obtain further information from the insurer.

Recommendation 27-4: Develop and publish policies for members on the use of family medical history for underwriting mutually rated insurance.

Recommendation 27-6: Require members to inform applicants of their statutory entitlement to reasons for an adverse underwriting decision based on genetic information, including family medical history.

Recommendation 27-7: Develop mandatory policies for members regarding the provision of reasons by an insurer to an applicant following an unfavourable underwriting decision based on family medical history. The policies should ensure that the reasons given are clear and meaningful and that they explain the actuarial, statistical or other basis for the decision.

Recommendation 27-9: Expand the jurisdiction of the FICS to allow that organisation to review underwriting decisions involving the use of genetic information.

Recommendation 27-10: Review IFSA policies and practices in relation to training and education of members regarding the collection and use of genetic information in insurance.

2.11 In relation to insurance and genetic privacy, the following recommendations were made in the ALRC 96 report:

Recommendation 28-1 & 28-2: Insurers should review their consent forms to allow applicants to make an informed decision about whether to proceed with their application and consent to the collection of genetic information.

Recommendation 28-3: Insurers should seek a Public Interest Determination (PID) under the *Privacy Act* in relation to the practice of collecting genetic information from applicants about their genetic relatives for use in underwriting insurance policies in relation to those applicants.

### **3. IFSA developments**

3.1 In January 2002, IFSA released its Standard no. 11.00 – “Genetic Testing Policy”, expanding on and formalising the draft policy that was presented to the Commission in 2000 as part of its application for authorisation. The purpose of the policy is to specify standards for handling genetic test results to be adopted by insurers in the operation of their business.

3.2 As IFSA’s Genetics Policy has now evolved into IFSA Standard No. 11.00, it has become compulsory for all IFSA members to comply with its provisions. IFSA confirms that all member companies have complied with the standard. There have been no changes in the market. The Standard states that no applicant is required to undergo genetic tests nor will they be offered preferential rates on the basis of the result of a genetic test. IFSA is unaware of any complaints from consumers to do with the application of the IFSA Genetic Testing Standard No.11.00.

- 3.3 IFSA had commissioned the Institute of Actuaries of Australia (IAAust) to collect data on the number and type of genetic tests that life insurance were receiving and the underwriting decision.
- 3.4 The IAAust have now completed 8 surveys over the four-year period 1 June 2000 to 30 November 2004. In that time 667 applications reporting a genetic test were received covering 1079 benefits. (death, trauma, disability income, total & permanent disability). Of the 1061 benefits underwritten, 859 were accepted on standard or non-standard terms, 87 the decision was deferred and 115 benefits were declined. Only 84 of the 115 benefits declined related to a positive test result.
- 3.5 The IAAust's next report will be for the year ending 30 November 2005.
- 3.6 ALRC 96 Proposal 27-4, 27-6 and 27-7 recommended that IFSA develop an industry standard to deal with Family Medical History (FMH). IFSA accepted the recommendation and developed a draft standard with the help & assistance of its members and interested stakeholders.
- 3.7 The IFSA Board are expected to approve the FMH standard before 24 December 2005 and for the Standard to take effect from 1 January 2006.
- 3.8 As an adjunct to the ALRC recommendations on family medical history, IFSA has participated in the development of a generic personal statement (GPS) which will be used by financial planners and others when gathering an applicant's health information. The question in the GPS, on family medical history only asks about first degree relatives:

**“Has your mother or father, or any brother or sister had breast, ovarian, colon or other cancer, diabetes, high blood pressure, heart problems, stroke, mental disorder, haemochromatosis, Huntington's Disease, muscular dystrophy, Familial Adenomatous Polyposis, polycystic kidney or any other hereditary disease?”**

If yes:

Please provide details:

<b>Relationship to Insured</b>	<b>Condition and type (eg cancer: breast)</b>	<b>Age at onset (approx.)</b>	<b>Age at death (if applicable) “</b>
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*Source: Life Industry Generic Personal Statement question 98 - FPA website – [www.fpa.asn.au](http://www.fpa.asn.au)*

- 3.9 ALRC 96 Recommendation 28.3 was for the industry to apply for a PID under the Private Sector Provision of the *Privacy Act*. IFSA has had discussion with the Office of Privacy Commissioner in regards to obtaining a PID and remain in discussion.
- 3.10 ALRC 96 Recommendation 7.5: IFSA also participated in the review of the *Privacy Act*. The report and recommendation from the review have been given to Government who are still to respond.
- 3.11 IFSA has also been active in the review of the *Insurance Contracts Act 1984 (Cth)* (ALRC Recommendation 27-5) undertaken by Government. All the recommendations in the reviewer's report were accepted by Government. The Bill is presently being drafted by Treasury.



3.12 ALRC 96 Recommendation 27.8 called for the *Disability Discrimination Act 1992 (Cth)* (DDA) and related legislation to be amended. The Productivity Commission undertook a review of the DDA and the Government response to the report's recommendations was for IFSA to work with HREOC to develop a guideline. Work is still to start on this initiative.

#### **4. Impact**

- 4.1 At the time authorisation was granted by the Commission on 21 November 2000, it was anticipated that the government would take steps to introduce legislative safeguards concerning the use of genetic technology (see paragraph 8.17 of the Commission's decision). The Commission was also aware of the impending establishment of the inquiry into the protection of human genetic information.
- 4.2 Although ALRC 96 was released in May 2003, the Government has not responded other than in the May 2005 Budget and therefore it remains in the public interest that the status quo be maintained.
- 4.3 The Treasurer in his May 2005 budget announced the establishment of a Human Genetics Advisory Committee (HGCA) and has provide new funding of \$7.6 million over four years from 2005-06 to establish an independent expert advisory body on human genetics as a principal committee of the National Health and Medical Research Council (NHMRC).
- 4.4 Rapid developments in human genetics and related technologies are likely to provide substantial benefits for Australians, particularly for health. It was also anticipated by the Commission in the previous determinations that there would be rapid advances in gene technology. Whilst there have been many developments in genetic research, the findings have in the main have not actually been approved or implemented by the Therapeutic Goods Administration, a division of the Commonwealth Department of Health and Ageing, pursuant to the *Therapeutic Goods Act 1989 (Cth)*.
- 4.5 However, there are many complex social, legal, ethical and scientific issues that arise from these technologies. The new advisory body will ensure that these matters receive careful assessment. The advisory body will consider the impact of new technologies and provide advice on how they might best benefit Australians. This was the key recommendation of ALRC 96 that IFSA has supported.
- 4.6 IFSA does not see itself as being an authoritative reference to describe the main developments in genetic research or the expected time frame for such findings to be approved or implemented by the Therapeutic Goods Administration (TGA). IFSA's responses are made on the basis of enquiries made by it with other organisations.
- 4.7 Human medically related genetics and functional genomics, a tiny subset of genetic research in general, has come into increasing prominence with the completion of the human genome project and the wide interest on the part of governments and private industry in biotechnology is based on human gene use. Diseases such as heart attacks and cancer and mental illness run in families, but it may be possible to use genetics to predict this with more certainty for each family member. However, there are no new issues of principle for the genetic professional or the TGA that IFSA is aware of.
- 4.8 IFSA considers that the effect of the conduct on the markets and the dynamics of the particular market have not changed and are unlikely to change until such time as the implementation of ALRC 96 recommendations.

- 4.9 By IFSA making a public statement in terms of a compulsory standard that clearly states that the industry will not seek to require genetic testing but only the disclosure of known results there is a clear statement that industry behaviour is acknowledging public concern and acting in a socially responsible manner that generates a public benefit.
- 4.10 The life insurance industry is a highly competitive market with in-excess of 20 active participants. There is likely to be no effect on competition if the clauses are authorised as this represents maintaining the status quo until the Government implements the ARLS 96 recommendations.

## **5. Application**

- 5.1 IFSA applies under section 91C of the Act for the revocation of the authorisation and substitution of a new authorisation for the one revoked, so that the initial period of time for the authorisation can be extended for a further period of time.
- 5.2 IFSA submits that the present environment of genetic testing is not substantially different to that when the Commission initially granted authorisation in November 2000. The principle development has been the release of ALRC 96 and the May 2005 Budget announcement.
- 5.3 IFSA submits that the clauses under the Standard 11.00 are likely to continue to result in net public benefit for the reasons provided in IFSA's earlier applications for authorisation. On the whole, there has not been any change in the nature of the conduct in question, its effect in the market nor the dynamics of the particular market.
- 5.4 IFSA requests that the authorisation be extended to the earlier of:
- (a) 5 years after authorisation is granted; or
  - (b) 6 months after legislation (and/or legislative amendments) to implement the recommendations of the HGCA;

## **6. Application for interim revocation and substitution**

- 6.1 IFSA also applies for interim authorisation, pending full consideration of the matter by the Commission.
- 6.2 Considering the approaching expiry of the existing authorisation, IFSA believes that it is imperative that interim authorisation be granted to avoid any possible harm or prejudice to its position, particularly considering that the Commission is only likely to make a final decision regarding the application for revocation and substitution after detailed consideration and a possible pre-industry conference.
- 6.3 If the authorisation did expire prior to the final decision by the Commission (and without interim authorisation having been granted), IFSA and its members would obviously lose the protection of the existing authorisation and be at risk of legal action under the anti-competitive provisions of the Act. This situation would not be in the public benefit.

Dated: 4 October 2005

Investment & Financial Services Associations