



**Australian
Competition &
Consumer
Commission**

PO Box 1199
Dickson ACT 2602
470 Northbourne Ave
Dickson ACT 2602
ph (02) 6243 1111
fax (02) 6243 1199
www.accc.gov.au

Our Ref: A90986 and A90989
Contact Officer: Shashi Sivayoganathan
Contact Phone: 03 9290 1832

11 October 2005

Dear

**Application for revocation and substitution (A90986 & A90989) lodged by the
Investment and Financial Services Association (IFSA)**

On 4 October 2005, the Australian Competition and Consumer Commission ("the ACCC") received an application from IFSA for revocation and substitution of Authorisations A90857 and A90869.

Authorisations A90857 and A90869 are due to expire on 25 December 2005.

IFSA is seeking re-authorisation for Clauses 10.1 and 10.3 of IFSA Standard No 11.00 ("the Standard"), the genetic testing policy adopted by IFSA members in undertaking life insurance business. These Clauses provide for an agreement between IFSA members that they will not require applicants for life insurance to undergo any genetic tests and will not induce applicants to undergo such testing by offering insurance at a lower than standard premium rate.

The ACCC and the authorisation process

By way of background, the ACCC is the Australian government agency responsible for administering the *Trade Practices Act 1974* ("the Act"). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.

Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment. The ACCC conducts a comprehensive public consultation



process before making a decision to grant or deny authorisation which involves informing interested parties about the application for authorisation and inviting submissions in response to it.

Revocation and substitution of an authorisation

Under section 91C of the Act, the ACCC may grant an application to revoke an existing authorisation and grant a substitute authorisation when it is satisfied that the proposed arrangements (that is, under the substitute authorisation) would, as with the original authorisation test, result in an overall public benefit. The ACCC also conducts the same public consultation process prior to making its determination.

Previous Authorisations – November 2000

On 21 November 2000, the ACCC initially granted authorisations A30200 and A30201 with respect to Clause 2 and 4 of IFSA's then Draft Genetic Testing Policy, the predecessor to the Standard. Authorisation was granted until 13 December 2002.

At the time of granting authorisation it was the ACCC's view that, given the prevailing environment of that time, namely IFSA's intention to review the Draft Genetic Testing Policy, anticipated developments in relation to genetic technology and the Commonwealth Government's intention to conduct a broad inquiry into the use of genetic testing generally, it was appropriate to grant a time limited authorisation to the arrangements.

On 29 May 2003, the joint report by the Australian Law Reform Commission and the Australian Health Ethics Committee of the National Health and Medical Research Council titled, "Essentially Yours: the Protection of Human Genetic Information" ("the Inquiry") was released. The Inquiry made a number of recommendations in relation to the use of genetic information within the insurance industry.

Previous Authorisations – December 2003

IFSA's Draft Genetic Testing policy has over time evolved into the Standard.

On 3 December 2003, ACCC granted authorisation to clauses 10.1 and 10.3 of the Standard, by way of revocation of Authorisations A30200 and A30201 and substitution with Authorisations A90857 and 90869.

In granting authorisation, it was the ACCC's view that:

- There was a public benefit in maintaining the status quo to allow a detailed evaluation of the recommendations made by the Inquiry and to allow sufficient time to implement the appropriate self-regulatory or legislative mechanisms;
- There was a public benefit in preventing insurers from coercing applicants for life insurance to undertake genetic testing; and

- If authorisation were denied, it may difficult to undertake an orderly evaluation of the recommendations made by the Inquiry in an environment where insurers are initiating genetic testing.

The ACCC concluded that these public benefits would outweigh any anti-competitive detriments resulting from life insurers agreeing not to use genetic tests as the basis for offering discounted insurance premiums. Accordingly, the ACCC granted authorisation until 25 December 2005.

IFSA's application for revocation and substitution

IFSA seeks re-authorisation of Clauses 10.1 and 10.3 of the Standard.

In its supporting submission, IFSA has submitted that the present environment of genetic testing is not dissimilar to that when the ACCC granted re-authorisation on 3 December 2003.

IFSA has submitted that the Australian Government is currently preparing a response to those recommendations directed towards it. IFSA states that, a number of the recommendations of the Inquiry have already been acted on, although the central recommendation of the Inquiry, namely establishment of Human Genetics Commission of Australia ("HGCA") has not been implemented as yet. In the 2005 Budget, the Australian Government announced it will provide funding of \$7.6 million over four years to establish an independent expert advisory committee of the National Health and Medical Research Council. IFSA has submitted that the principle development since December 2003 has been the announcement by the Australian Government that it will provide funding to establish the advisory committee.

IFSA has submitted that on the whole, there has not been any change in the nature of the conduct in question, its effect on the market nor the dynamics of the particular market. IFSA has submitted that the relevant Clauses of the Standard are likely to continue to result in a net public benefit.

IFSA has sought revocation of Authorisations A90857 and A90869 and substitution with Authorisations A90986 and A90989 on the same terms for the following periods:

- 5 years after re-authorisation is granted; or
- 6 months after legislation (and / or legislative amendments) to implement the relevant recommendations of the HGCA is enacted.

In addition, IFSA has sought interim authorisation for Clauses 10.1 and 10.3 of the Standard to enable IFSA and its members to continue engage in the conduct without breaching the competition provisions of the Act while the ACCC considers the merits of the substantive application for re-authorisation.

A copy of IFSA'S application is attached to this letter and is also available on ACCC's website: www.accc.gov.au

Your views are sought

As a potentially interested party you are invited to make a written submission to the ACCC regarding the likely public benefits and effects on competition of the arrangements for which authorisation is sought. In particular, the ACCC would be interested in your views on the following:

- Do you agree that public benefits will flow from continuing to grant immunity to the conduct?
- Do you consider that there might be any detriment to competition and/or the public caused by IFSA members continuing to follow the Standard?
- Do you have any other comments on the Standard?

The ACCC asks for submissions to be in writing so that they can be made publicly available. Submissions are placed on a public register and may also be placed on the ACCC's website. The ACCC may, where appropriate, supplement written submissions with discussions with relevant parties on a mutually convenient basis.

A copy of this letter will be placed on the ACCC's Public Register.

Should you lodge a submission with the ACCC you may request that information included in the submission be treated as confidential and not placed on the public register or the ACCC's website. In such circumstances you must justify why the ACCC should treat such information as confidential, otherwise it would be expected to be made public. The ACCC may take confidential information into account during its assessment of an application. Guidelines for seeking confidentiality are attached for your information.

If you wish to lodge a submission, please address it to:

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

Submissions can also be lodged by email to adjudication@acc.gov.au, or by facsimile on (02) 6243 1211.

If you intend to provide a submission in relation to the substantive applications, please do so by **close of business Friday 4 November 2005**. If you wish to make a submission with regards to the interim authorisation, please provide your comments by **close of business Monday 24 October 2005**.

Please inform us if you do not wish to make a submission at this time, but would like to be informed of the progress of these applications at the draft and final determination stages. You can also forward this letter to any other party who may wish to make a submission to the ACCC regarding this application.

Should you have any queries or if you wish to discuss any aspect of this matter further please contact Shashi Sivayoganathan on (03) 9290 1832.

Yours

P1



Scott Gregson
General Manager
Adjudication Branch

GUIDELINES FOR CONFIDENTIALITY CLAIMS

The process whereby the Commission assesses applications for authorisation or notification is very public, transparent and consultative. The *Trade Practices Act 1974* (the Act) requires the Commission to maintain a public register in respect of authorisation and notification applications.

Applicants and interested parties can request that a submission, or part of a submission, be excluded from the public register.

The Commission is required under the Act to exclude from the public register upon request details of:

- (i) secret formulae or process;
- (ii) the cash consideration offered for the acquisition of shares in the capital of a body corporate or assets of a person; or
- (iii) the current manufacturing, producing or marketing costs of goods or services.

However, even if a document does not meet these technical requirements, the Commission may still grant confidentiality where, in the Commission's view, it is desirable to do so.

The Commission also has the discretion, under s89 of the Act, to exclude material from the public register if it is satisfied that it is desirable to do so, either by reason of the confidential nature of the material or for any other reason. The Commission expects that a party claiming confidentiality on these grounds will present a case for its treatment in this manner.

Under Regulation 24 of the *Trade Practices Regulations*, when a request for confidentiality is made to the Commission:

- (a) where the request is that a whole document be excluded, the words "**Restriction of Publication Claimed**" should appear in red writing near the top of each page; and
- (b) where the request is that part of a document be excluded, the words "**Restriction of Publication of Part Claimed**" should appear in red near the top of the first page of each document, and the part for which confidentiality is claimed should also be marked in red. A submission of more than 5 pages should also include a description of the whereabouts of the parts for which confidentiality is claimed.

Applicants, as a matter of course, should remove headers claiming "confidential communication" from all Emails and otherwise, unless they have a particular piece of information that they justify to the Commission deserves exclusion from the public register. If confidentiality is not requested but a header cannot be removed, it should be clearly stated at the beginning of the communication that confidentiality is not requested.

If the Commission denies a confidentiality request, the requesting party may ask that the material be returned. As a matter of practice, the Commission will specify a period (usually 14 days) in which they can request the return of such material. Upon response, the Commission will return the original material and destroy all associated copies. The Commission will not consider this material when reaching its decision.

If the Commission does not receive a response within the specified period, the original material will be placed on the public register.

Information or documents granted confidentiality may be used by the Commission pursuant to its powers generally under the *Trade Practices Act*.

	Name	Sai	Address1	End
1	Ms Michelle Kosky Executive Director	Ms Kosky	Health Consumers Council GPO Box C134 PERTH WA 6000	sincerely
2	Ms Susan Wareham Manager of Marketing and Planning	Ms Wareham	Australian Medical Research 88 L'estrange Terrace KELVIN GROVE QLD 4059	sincerely
3	Dr William Glasson President	Dr Glasson	Australian Medical Association PO Box 6090 KINGSTON ACT 2604	sincerely
4	Ms Kristin English	Ms English	Department of Health and Ageing Penrhyn house WODEN ACT 2606	sincerely
5	Ms Megan Mitchell Director	Ms Mitchell	Australian Council of Social Service Locked Bag 4777 STRAWBERRY HILLS NSW 2012	sincerely
6	Mr Martyn Goddard Senior Health Policy Officer	Mr Goddard	Australian Consumers Association 57 Carrington Road MARRICKVILL E NSW 2204	sincerely
7	Mr Gerard Thomas	Mr Thomas	Combined Pensioners & Superannuants Association of NSW Incorporated Level 3 25 Cooper St SURRY HILLS NSW 2010	sincerely
8	Mr Chris Connolly Chairman	Mr Connolly	Financial Services Consumer Policy	sincerely

	Name	Sal	Address1	End
			Centre Law Faculty Room 1212 Mathews Building University of NSW NSW 2052	
9	Ms Sally Crossing	Ms Crossing	Breast Cancer Action Group O'Connell Street GREENWHICH NSW 2065	sincerely
10	Ms Helen Martin President	Ms Martin	Institute of Actuaries of Australia Level 7 4-10 Martin Place SYDNEY NSW 2000	sincerely
11	Director	Sir / Madam	Murdoch Children's Research Institute Royal Children's Hospital Flemington Road PARKVILLE VIC 3052	faithfully
12	Professor David Davis President	Mr Davis	Royal College of Pathologists Australasia Durham Hall 207 Albion St SURRY HILLS NSW 2010	sincerely
13	Director	Sir / Madam	John Curtin School of Medical Research Australian National University PO Box 334 CANBERRA CITY ACT 2601	faithfully
14	Dr David Turner Department of Haematology and Genetic Pathology	Dr Turner	School of Medicine Flinders University GPO Box 2100 ADELAIDE SA	sincerely

	Name	Sal	Address1	End
			5001	
15	Dr Kerry Breen Australian Health Ethics Committee	Dr Breen	Maildrop 100 Office of NHMRC GPO Box 9848 CANBERRA ACT 2601	sincerely
16	Ms Sylvie Garner	Ms Garner	Office of the Federal Privacy Commissioner GPO Box 5218 SYDNEY NSW 2001	sincerely
17	Professor John Christodoulou President	Professor Christodoulou	Human Genetic Society of Australasia RACP 145 Macquarie Street Sydney NSW 2000	sincerely
18	Prof Margaret Otlowski Department of Law	Prof Otlowski	University of Tasmania GPO Box 252 HOBART TAS 7001	sincerely
19	Ms Helen Hopkins Executive Director	Ms Hopkins	Consumer Health Forum of Australia PO Box 3099 MANUKA ACT 2603	sincerely
20	Ms Linda Hornsey Secretary Department of Premier and Cabinet	Ms Hornsey	GPO Box 123 HOBART TAS 7001	sincerely
21	Dr John Carnie Director Disease Control and Research	Dr Carnie	Department of Human Services 555 Collins Street MELBOURNE VIC 3000	sincerely
22	Ms Robyn Kruk Director General	Ms Kruk	NSW Department of Health Locked Mail Bag 961 NORTHERN SYDNEY NSW	sincerely

	Name	Sai	Address1	End
			2059	
23	Dr Robert Stable Director General	Dr Stable	Queensland Health 19 th Floor, Queensland Health Building 147-163 Charlotte Street BRISBANE QLD 4000	sincerely
24	Mr John Ramsay Secretary	Mr Ramsay	Department of Health and Human Services 3 rd Floor, 34 Davey Street HOBART TAS 7000	sincerely
25	Mr Jim Birch Chief Executive	Mr Birch	Department of Human Services PO Box 287 Rundle Mall ADELAIDE SA 5000	sincerely
26	Mr Mike Daube Director General	Mr Daube	Health Department of Western Australia Box 8172 PERTH WA 6849	sincerely
27	Mr Robert Griew CEO	Mr Griew	Territory Health Services Health House 87 Mitchell Street DARWIN NT 0800	sincerely
28	Ms Penny Gregory Chief Executive Officer	Dr Gregory	ACT Department of Health, Housing and Community Care Level 2, North Building London Circuit CANBERRA ACT 2601	sincerely
29	Professor Allan Pettigrew Chief Executive Officer	Professor Pettigrew	National Health and Medical Research Council MDP 100, GPO Box 9848	sincerely

	Name	Sal	Address1	End
			CANBERRA ACT 2601	
30	Mr Alan Mason Executive Director	Mr Mason	Insurance Council of Australia Level 3 56 Pitt Street Sydney NSW 2000	sincerely
31	The Secretary	Sir/Madam	Australian Privacy Charter Council Faculty of Law University of NSW c/- PO Box Q3 QVB SYDNEY NSW 2000	faithfully
32	The Secretary	Sir/Madam	Attorney General's Department Central Office Robert Garran Offices National Circuit BARTON ACT 2600	faithfully
33	Mr Graeme Innes Deputy Disability Discrimination Commissioner	Mr Innes	Human Rights and Equal Opportunity Commission GPO Box 5218 SYDNEY NSW 1042	sincerely
34	Prof David Weisbrot President	Prof Weisbrot	Australian Law Reform Commission Level 10, 131 York Street SYDNEY NSW 2000	sincerely
35	Dr Kristine Barlow-Stewart Director	Dr Barlow-Stewart	The Centre for Genetics Education Level 3, Block 4 Royal North Shore Hospital Pacific Highway	sincerely

	Name	Sal	Address1	End
			St Leonards NSW 2065	
36	Ms Jennifer Blackwell Executive Officer	Ms Blackwell	NSW Department of Health Genetics Service Level 9, 73 Miller Street North Sydney NSW 2060	sincerely
37	Dr Matthew Edwards Clinical Genetics	Dr Edwards	Hunter Genetics PO Box 84 Waratah NSW 2298	sincerely
38	Ms Kerrie Kelly Chief Executive	Ms Kelly	Financial Planning Association of Australia Limited GPO Box 4285 SYDNEY NSW 2001	sincerely
39	Ms Robyn Kapp Executive Officer	Ms Kapp	Australian Huntington's Disease Assoc (NSW) PO Box 178 West Ryde NSW 1685	sincerely
40	Dr Simon Longstaff Director	Dr Longstaff	The St James Ethics Centre GPO Box 3599 SYDNEY NSW 1044	sincerely
41	Mr Michael Rawstrom General Manager Corporations and Financial Services Division General Manager Financial Institutions Division	Mr Rawstrom	Department of Treasury Langton Crescent PARKES ACT 2600	sincerely
42	Ms Jennifer O'Donnell Deputy Executive Director	Ms O'Donnell	Australian Securities and	sincerely

	Name	Sal	Address1	End
			Investments Commission Level 20 CGU Tower 485 La Trobe Street MELBOURNE VIC 3000	
43	Dr Steve Hambleton President	Dr Stitz	AMAQ PO Box 123 Red Hill Qld 4101	sincerely
44	Ms Sharon Van-der Lann Executive Director	Mr Van-der Lann	Genetic Support Council WA (Inc) Level 1, Oasis Lotteries House 37 Hampden Road Nedlands WA 6009	sincerely
45	Associate Professor Judy Kirk Clinical Associate Professor	Associate Professor Kirk	Westmead Health PO Box 533 Wentworthville NSW 2145	sincerely
46	Ms Karen Cox Manager	Ms Cox	Consumer Credit Legal Centre (NSW) Inc PO Box 538 SURRY HILLS NSW 2010	sincerely
47	Ms Su Mahalingham Coordinator	Ms Mahalingham	Consumer Credit Legal Service (WA) Level 1, 231 Adelaide Terrace PERTH WA 6000	sincerely
48	Ms Carolyn Bond Coordinator	Ms Bond	Consumers Federation of Australia C/- Consumer Credit Legal Service Victoria	sincerely

	Name	Sal	Address1	End
			1 st Floor, 11-19 Bank Place MELBOURNE VIC 3000	
49	Ms Heather Neilson	Ms Neilson	Financial and Consumer Rights Council Level 13, 227 Collins Street MELBOURNE VIC 3000	sincerely
50	Mr John Laker Chairman	Mr Laker	APRA GPO Box 9836 Sydney NSW 2001	sincerely
51	Senator Natasha Stott Despoja Democrats Senator for South Australia	Ms Despoja	Australian Democrats PO Box 5089 Kingston ACT 2604	sincerely
52	Mr Rod Shaw	Mr Shaw	Biotechnology Australia GPO Box 9839 Australia 2601	sincerely
53	Brenda Masters	Ms Masters	Centre for Law and Genetics Level 9 Melbourne Law School University of Melbourne Melbourne Victoria 3010 Australia	sincerely
54	Managing Director	Sir/Madam	PrefSure Life Limited 1 O'Connell Street Sydney NSW 2000	faithfully

	Name	Sal	Address1	End
55	Managing Director	Sir/ Madam	AXA Health Insurance 447 Collins Street Melbourne Vic 3000	faithfully
56	Mr Keith Scott Chief Operating Officer	Mr Scott	Swiss Re Australia limited Level 29 357-363 George Street Sydney 2000	sincerely

	c/o Vicki Toppinen Chief Executive Officer	Ms Toppinen	AMP Life Limited Level 24, 33 Alfred Street SYDNEY 2000 NSW
--	---	--------------------	--