28 October 2005

Mr Scott Gregson
General Manager
Adjudication Branch
Australian Competition and
Consumer Commission
PO Box 1199
DICKSON 2602
ACT

Dear Mr Gregson,

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

Thank you for your letter of 11 October 2005 and the invitation to make a submission in relation to the Investment and Financial Services Association's (IFSA) application for revocation and substitution of previous authorisations A90986 & A90989.

As noted in my previous submissions to the Commission, I am on the record for arguing that insurers' access to and use of genetic test information should be restricted, at least with regard to small to average sized policies, to avoid problems of discrimination and misunderstandings in relation to the significance of this information: 'Resolving the Conundrum: Should Insurers be Entitled to Access to Genetic Test Information?' (2000) 11 *Insurance Law Journal* 193-215; *Implications of Genetic Testing for Australian Insurance Law and Practice*, Centre for Law and Genetics, Occasional Paper No. 1 (2001).

As outlined in IFSA's application, the Government's response to the recommendations of the Australian Law Reform Commission and the Australian Health Ethics Committee of the National Health and Medical Research Council contained in the *Essentially Yours* Report (2003) is still awaited. (To date, the only official response from Government has been the announcement of funding in the 2005 Budget for the establishment of a Human Genetics Advisory Committee as a principal committee of the National Health and Medical Research Council.)

If the Inquiry's recommendations in relation to insurance are implemented, it is likely that there will be some legislative changes concerning insurers' access to and use of genetic information resulting in an increase in the level of protection for individual consumers in their dealings with life insurers in respect of applications involving disclosure of genetic information. It is, however, difficult to predict the time-frame involved: no date has been officially set in relation to the release of the Government's response, and even once the Government's response is released, and assuming recommended changes in relation to insurance are supported, implementation would inevitably take some time. In the meantime, the IFSA Genetic Testing Policy, now an industry standard *(Standard No 11.00 Genetic Testing Policy),* plays a useful role in providing some safeguards in the use by insurers of genetic test information as well as protecting the confidentiality of that information.

There are, in my view, real social and health advantages of observing a policy of restraint in the use of genetic testing. Significant features of the *'Standard No 11.00 Genetic Testing Policy'* include the provision that insurers will not initiate genetic testing (clause 10.1) and will not seek to offer lower premiums in light of favourable genetic test results (clause 10.3). These provisions address concerns about coercive genetic testing which has been strongly cautioned against by health care professionals and in international statements such as the Council of Europe *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine,* the *Bioethics Convention of Human Rights and Biomedicine,* Strasbourg, Nov. 1996. DIR/JUR (96) 14, Article 5; and the *Universal Declaration on the Human Genome and Human Rights* (adopted by the General Conference of UNESCO in November 1997) Article 5, which emphasise the need for voluntary consent. Notably, the *'Standard No 11.00 Genetic Testing Policy'* has been developed in light of responses from consumer groups and should be regarded as an attempt to develop an appropriate policy for genetic testing having regard to wider public interests, rather than as an attempt to act anti-competitively. Whilst there is potential for these clause to operate in a manner which is anti-competitive (preventing life insurers from offering differentiated premiums to consumers), there is an important public benefit to be gained from life insurers not coercing individuals to undergo genetic testing which outweighs any risk of anti-competitive detriment.

Consistent with my support for IFSA's earlier applications, I wish to register my support for the current application for re-authorisation of Clauses 10.1 and 10.3 of the IFSA *Standard No 11.00.* I agree with IFSA's submission that there has been negligible change in the environment of genetic testing since the previous application in 2003, and in particular nothing to suggest any change in the nature of the conduct in question, its effect on the market, nor the dynamics of the particular market. For the reasons outlined above, I agree that public benefits will flow from continuing to grant immunity to the conduct. I do not consider that there would be any detriment to competition and/or the public caused by IFSA members continuing to follow the standard.

With regard to timeframe, it is noted that IFSA is seeking re-authorisation for a '5 year period' or, '6 months after legislation (and/or legislative amendments) to implement the

relevant recommendations of the HGCA is enacted'. I was unclear as to the meaning of the latter referenceand wondered whether this perhaps should read 'recommendations of the ALRC/AHEC Inquiry' rather than 'HGCA' as it is implementation of the ALRC/AHEC Inquiry recommendations which are most immediately at issue.

It is important that adequate time is allowed to permit appropriate implementation through legislation or self-regulatory mechanisms once the Government's response to the *Essentially Yours* Report is released. Once that process is finalised, it will be appropriate to review the situation. It is quite possible that there will be no legislative or other ban on insurers initiating genetic tests or offering lower premiums in light of favourable genetic test results resulting from the implementation process – conduct which is the subject of this authoriation. There were certainly no specific recommendations made in the *Essentially Yours* Report to this effect, probably because it was felt unnecessary in the light of the industry's current Genetic Testing Policy which operates as an industry standard. There may, therefore, be a continued need for ACCC authorisation of these clauses of the IFSA Standard, even beyond the time frame that is proposed in IFSA's application. By then, the proposed Human Genetics Advisory Committee of the NHMRC will be operational and it would be appropriate for the matter to also be referred to that committee for its guidance.

In short, whilst I have reservations about insurers' use of genetic test information which are on the public record, and therefore do not agree with all aspects of the *'Standard No 11.00 Genetic Testing Policy,'* on balance, I believe it is preferable for the *'Standard No 11.00 Genetic Testing Policy'* to be in place than for no policy at all regulating this area during this interim period whilst the Inquiry's reform proposals are being considered and (most likely) implemented. I accordingly support IFSA's application for re-authorisation.

Please let me know if further information (or clarification of any of the above) is required.

Yours faithfully,

Professor Margaret Otlowski
Deputy Director
Center for Law and Genetics
Faculty of Law
University of Tasmania