July 1, 2003

Dear Productivity Commission

RE: Inquiry in the Disability Discrimination ACT 1992

In July 2002 Denice won a trip for two people to Japan. Denice applied for travel insurance from an Australian Insurer stating on the application that she had metastatic breast cancer. Denice was expecting the Insurer not cover her for the cancer, a pre-existing illness. Travel insurance was refused in total. To exclude Denice from all policy items was considered by us to be **disability discrimination**.

In September 2002, Denice lodged a disability discrimination complaint with the Human Rights and Equal opportunity Commission (HREOC) against the Insurer. HREOC assigned an Investigation/Conciliation Officer with whom we dealt up to and including the conciliation day in February 2003. The case was not resolved in the conciliation and the President of HREOC terminated Denice's complaint as she was "satisfied that the alleged unlawful discrimination is not unlawful". HREOC sided with the Insurer by agreeing that Denice's cancer was grounds for denying all insurance cover (even lost luggage), not just those parts medically related. The case will now be heard in the Federal Magistrates Court later this year.

The legal argument revolves around Section 46 of the Disability Discrimination Act 1992 (DDA). As the insurer had no actuarial or statistical data they have relied on the key words "the discrimination is reasonable having regard to any other relevant factors".

Section 46 of the DDA has been in use for some 11 years and has not been tested to determine what is **reasonable** or **relevant**. Only **one** similar case using this act has made it to any of the Federal Court's. The case is Theodore Xiros v Fortis Life Assurance Ltd (Fortis) in the Federal Magistrates Court in Adelaide on April 6, 2001 that dealt with Section 46 of the Disability Discrimination Act 1992 (DDA). In this case the Fortis had actuarial or statistical data where as the Insurer does not in Denice's case. Thus Denice's case will be a test of another part of Section 46. The Federal Magistrate said "In the present case the proceedings called for the interpretation and application of section 46 of the DDA, a provision in relation to which Driver FM stated that he had not found any previous judicial consideration. He said that this decision would have some precedent value and will have implications for other insurance policies and possibly a large number of similar policies. The proceedings therefore contain a public element of substance."

In reference to your inquiry it is our view that Section 46 of the DDA is too loose as it has no guidelines as to what might be considered **reasonable** or **relevant.** It will now be up to the Federal Magistrates Court in Adelaide to determine this.

We found the HREOC complaint process was stressful, taking almost seven months to get to conciliation. This is probably not considered to be a long time in government circles but for Denice, whose treatment is palliative, every day is precious. The stress on Denice is undesirable medically.

We obtained legal assistance for the conciliation conference from a community legal service. What we were not told by HREOC before the conciliation was that we could not ask questions of the insurer.

The ongoing nature of this complaint means that instead of putting this travel insurance denial to the back of your mind as much as you can, there are continual reminders of it and thus the cancer. This adds to the stress amongst the family. We also have the financial worries of taking on an insurance company.

Our reasons for pursuing this case is not just for people with cancer but many other people with pre-existing medical conditions like insulin dependant diabetics or those with mental health problems who have similar problems in obtaining travel insurance.

Yours Faithfully

Mr Michael Bassanelli and Mrs Denice Bassanelli