Modernising Business Communications

FSC Submission

February 2021

Contents

1. About the Financial Services Council 3

2. Executive Summary 4

3. FSC Recommendations 5

4. Burden of Treasury laws on business communications 6

4.1 Cost of compliance 7

4.2 Proposed categories in the Treasury Consultation 7

4.3 Proposed principles 8

4.3 Impact of technology neutral laws for consumers 8

4.4 Improving the consumer experience across industry through reformed disclosure 8

5. Written communication with stakeholders 10

5.1 Virtual Meetings and Electronic Execution 10

5.2 Communication with superannuation members 10

5.3 Cancellation requirements for risk only contracts of life insurance 11

5.4 Requirements to endorse policy documentation 14

5.5 Requirements for issuing replacement policy documentation 14

5.6 War exclusions can be void 16

6. Record keeping requirements 18

6.1 Technology-neutral compliance with the Best Interests Duty in the Corporations Act 18

6.2 Removing barriers to direct online investment 18

FINANCIAL SERVICES COUNCIL

1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advice licensees and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing $3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Executive Summary

The FSC welcomes the opportunity to submit to Treasury on improving the technology neutrality of Treasury portfolio laws, noting Treasury's prioritisation of this review.

The FSC notes government reforms to the Digital Economy and Senate Inquiries into technology neutrality.

The FSC submission makes a number of recommendations relating to:

- The compliance burden with regard to technology -neutral laws and associated costs and the impact this has on the overall consumer experience
- Interaction of legislation such as the *Electronic Transactions Act 1999;*
- The legal framework for electronic executions, witnessing and virtual meetings (e.g. Annual General Meetings); and
- Appropriateness of current legislative requirements governing communications and record keeping of life insurance policies set out in the *Life Insurance Act 1995* and *Insurance Contracts Act 1984*; and
- A technology-neutral approach to key pillars of the consumer protection frame work such as the Best Interests Duty and other areas of the Corporations Act

3. FSC Recommendations

- The identified compliance burden should be addressed in further improvements to the technology neutrality of Treasury portfolio laws.
- Treasury should also consider how consumers are accessing key documents and material provided by the sector as part of their financial capability workstream to help understand current literacy levels and help lift consumer engagement.
- Exposure Drafts of revised legislation should be consulted on with industry to ensure proposed legislation interacts with the existing disclosure framework effectively.
- Treasury should adopt the recommendations made by the FSC in November 2020 on its Draft **(ED)** of the Corporations Amendment Virtual Meetings and Electronic Communications) Bill 2020
- Modify the Electronic Transaction Regulations to ensure communications under the SIS Act and SIS regulations are no longer exempt from the Electronic Transactions Act
- Make clear through legislative amendment that risk only life insurance policies may be cancelled in accordance with requirements of s59 of the Insurance Contracts Act.
- Repeal endorsement requirements set out in Section 200(2)(b) and Section 213 of the Life Insurance Act to reflect current practices.
- Repeal Part 10, Division 7 of the Life Insurance Act 1995. The widespread use of e-technology across all forms of business activity has rendered the paper-based thrust of Part 10, Division 7 anachronistic. The onus is on insurers to maintain availability of policy terms.
- Repeal Section 229 of the Life Insurance Act to reflect the electronic completion of applications
- Treasury should consider the role of technology-neutral laws to support efficient and effective compliance with the Best Interests Duty in the Corporations Act.
- Wholesale permanent relief from section 1016A of the Corporations Act should be provided on a competitively neutral basis – that is to issuers, platforms and other market participants via a secure electronic means, not just in relation to the ASX. This should also include funds which qualify under the Asian Region Fund Passport initiative in order to increase the availability of passport funds and ensure they can compete effectively with local funds.

4. Burden of Treasury laws on business communications

There are aspects of the current regulatory landscape that create a burden on businesses in relation to business communications that could be improved. These include:

- **Duplication of legislative requirements regarding electronic transactions**: In addition to the Electronic Transactions Act **(ETA)**, each Australian State and Territory have their own ETA, which generally mirrors the Commonwealth Act, but provides jurisdiction-specific legislative exemptions of circumstances where an electronic signature cannot be used. This adds complexity and risk to doing business across state lines.
- **Lack of interaction between relevant laws:**
    - **Rigidity:** The *Superannuation Industry (Supervision) Act 1993* (**"the SIS Act"**) does not consider electronic communications, and Schedule 1 of the *Electronic Transactions Regulations 2000* excludes most communications required by funds under the SIS Act from coverage under the *Electronic Transactions Act 1999*. This means that funds cannot rely on electronic means of communication such as email, SMS or apps to contact members. It also means consumers are often unable to provide consent for changes to their superannuation arrangements by electronic methods, creating a barrier to engagement. To realise the benefits of access and efficiency for consumers fintech offers, updating the laws governing super as well as other industries to ensure these are technology neutral and fintech ready should be a priority for policymakers.
    - The Corporations Act is excluded from the ETA means requirements in the Corporations Act do not benefit from the ETA and this can create legal uncertainty as to whether electronic form is suitable for Corporations Act requirements, for example whether deeds can be executed electronically.
    - **Disclosure:** There needs to be a consistent approach to reviewing and amending Chapter 7 of the Corporations Act, ETA, the Insurance Contracts Act, the SIS Act and relevant regulatory guides and reports impacting disclosure. An inconsistent or overlapping approach, as is currently the case, with different rules makes it complex for industry and consumers and discourages business investment to better inform and engage consumers. The FSC has provided feedback to ASIC on this issue as it pertains to personal advice where substantial disclosure requirements are having significant cost impacts on advice licensees notwithstanding the cost-impacts of varying forms of disclosure obligations across financial services.[1]

- **The ETA does not address the issue of witnessing (or notarising) documents:**
    - Other jurisdictions (such as the US UETA) allow the witnessing of electronic signatures. Australian law largely precludes documents that require witnessing to be transacted electronically.

Recommendation
The identified compliance burden should be addressed in further improvements to the technology neutrality of Treasury portfolio laws.

[1] FSC Submission: ASIC Consultation Paper 332

4.1 Cost of compliance

The following costs are associated with the compliance burden of laws relating to business communications and a lack of technology neutrality:

"Invalidity and unenforceability" cost
Signing a document electronically carries the risk of it being non-binding due to failure to comply with its formalities.

- For example, this applies to situations for signing of documents such as a deed. The formalities include that a deed be "signed, sealed and delivered", the signing of the deed by the signatory be attested in the presence of a witness, and compliance with each jurisdiction's prescribed requirements for the execution of a deed in the jurisdiction in which the deed is formed. If this is done electronically the deed may be determined to be invalid.
- In other examples electronic signatures have been challenged in court for the court to determine if the e-signature is valid or not. A ruling by the courts on this in one jurisdiction may be treated differently in another.

"Time and effort" cost
The complexity of the requirements, and state-based requirement variations, add to the complexity and the end cost of complying. There is a cost associated with the time and effort required to understand the different requirements that apply federally and across different States and Territories. In some cases there is additional cost for legal advice to ensure clarity on the requirements across the different State and Territory jurisdictions.

In addition, there is also the time cost of hard copy communications that can be reduced with electronic communications for example to mail out a document, have it manually signed and mailed back could take more than a week. In contrast, if done by electronic means this same process can be completed in a much shorter timeframe perhaps in a few minutes in some cases. This adds efficiency and enables businesses to proceed must faster which can have a number of advantages for all parties.

Resource costs
Where hard copy communications are required there are resource costs that are likely higher than the equivalent cost if the same communication was done electronically for example where a hard copy communication is required to be printed and mailed to a customer there are associated postal and material costs (paper, ink) that would be significantly reduced if the same communication can be sent via electronic means eg email. Our marketing data indicates a cost comparison of between $1.50-$3.00 for a communication printed and posted by mail vs around $0.10 for sending the communication via email. Another example would be the cost of hosting a meeting in person where the current legislation requires this versus an online meeting which would have lower overheads (eg travel costs, venue costs, catering etc).

4.2 Proposed categories in the Treasury Consultation

The FSC agrees with the proposed categories Treasury has identified for consideration as part of its review.

The following documents in relation to written signature requirements pose a challenge currently and should be considered:

- Certain documents under legislation relating to health insurance, life insurance and general insurance
- Statutory declarations
- Binding beneficiary nominations
- Wills and other testamentary instruments
- Powers of Attorney
- Other documents that require witnessing of signatures

4.3 Proposed principles

The FSC supports the proposed principles but request that clarity is provided where changes are made in line with these principles to avoid future confusion.

For example, in relation to written signatures the consultation paper states a key principle is "provided that the electronic method used provides at least the same level of validity as a physical signature." The FSC suggests that clarity should be provided on what the same level of validity means. This may depend on the purpose of the signature in different scenarios, for example in some cases a read receipt or email acknowledgement may be sufficient. Where witnessing is required guidance should be provided to clarify how the 'same level of validity' could be achieved electronically.

If there continues to be a situation where there is both State-based and federal requirements including both State and Federal ETAs there will continue to be barriers and risks associated with implementing the principles. It would be preferable to have Federal legislation which dictates the requirements and all States and Territories adhere to the single Federal act.

4.3 Impact of technology neutral laws for consumers

COVID-19 has spurred the imperative and ability to provide services to consumers remotely and efficiently with the following benefits:

- Faster turnaround times,
- Improved accessibility of advice to clients in rural and regional locations and to clients who, for various medical, psychological or social/environmental reasons, find it difficult to travel and attend appointments in person.
    - For example, *ThinkAdviser* reported in November 2020 "that data from *SmartAsset*'s advisor-matching tool shows a 27% increase in investors' willingness to work remotely. Whereas before the pandemic, less than half of investors were comfortable working with a remote advisor, today more than 63% are willing to do so."[2]

Disadvantages could include an increased risk of identity fraud.

4.4 Improving the consumer experience across industry through reformed disclosure

Neutrality and consistency across products (that is disclosure documents and notification or digital signatures eg (binding death nominations) should be consistently technology-neutral across all financial services products. That is, it should be feasible to take a consistent

---

[2] Source: https://www.thinkadvisor.com/2020/11/11/covid-19s-impact-on-the-advisor-client-relationship/)

technology approach to providing and receiving information from consumers whether it is a super, investment, life or banking or similar product. In doing so, this supports investment in more effective ways of engaging consumers and allows consumers to receive and respond in similar ways irrespective of the product type.

Alignment of these changes should all happen at the same time to ensure consistency across all product types that consumers interact with.

Recommendation
Treasury should also consider how consumers are accessing key documents and material provided by sector as part of their financial capability workstream to help understand current literacy levels and help lift consumer engagement.

Recommendation
Exposure Drafts of revised legislation should be consulted on with industry to ensure proposed legislation interacts with the existing disclosure framework effectively.

5. Written communication with stakeholders

5.1 Virtual Meetings and Electronic Execution

In November the FSC provided comment on the proposed Exposure Draft **(ED)** of the Corporations Amendment Virtual Meetings and Electronic Communications) Bill 2020. The FSC recommends that the following recommendations in relation to that Bill are considered by Treasury as it reviews technology-neutral laws:

- The legislation should not be hurried through the Parliament. The drafting then can be refined and informed by reference to practical experience during the current AGM "season" and for the duration of the current temporary modification period (which ends on 21 March 2021).
- The FSC agrees in principle with proposals concerning remote execution and witnessing and the clarity provided in relation to execution of deeds and recommends that further clarity be provided in some aspects of the drafting and the final drafting be informed by practical experiences during the modification periods.
- Under the proposed new legislation, company documents executed by both with and without a seal may be executed using electronic means. To provide consistency, the FSC recommends extending this relief to also cover ASIC forms.
    - Some of the ASIC forms, eg Form 520 Declaration of solvency and Form 491 Changes to scheme details, require wet-ink signature and have to be lodged by post. By extending the proposed relief, it would allow companies to more effectively engage with ASIC.
- Although the legitimacy of virtual meetings is to be commended, attendance and participation in physical company meetings is an important shareholder right. There needs to be safeguards introduced to ensure all participants have appropriate rights to be heard. There also needs to be some clarity concerning issues around the use of technology for virtual meetings and fairness to all participants. Again, we believe that some of these issues will be identified during the current period of AGMs.

Recommendation
Treasury should adopt the recommendations made by the FSC in November 2020 on its Draft (ED) of the Corporations Amendment Virtual Meetings and Electronic Communications) Bill 2020

5.2 Communication with superannuation members

The *Electronic Transactions Regulations 2000* exclude most communications specified by the SIS Act from the provisions of the *Electronic Transactions Act 2000*.

As a result, superannuation funds are required to provide the majority of required communications by post, even where members prefer an electronic communication.

Superannuation members are also required to provide paper forms back to their superannuation fund to make changes to their account – for example, to adjust insurance arrangements.

This can significantly increase the complexity and cost of engagement for both superannuation funds and members.

Ideally, where a valid means of electronic communication is provided to superannuation fund, financial services providers should be able to use this as the primary means of contact without obtaining separate consent.

Removing the exemption would:

- allow individuals to provide notices, including signatures, in electronic form to a trustee (such as a binding death benefit nomination) where the trustee provides such a mechanism for doing so. This would extend to any member declarations or third party documents such as medical reports (requiring a doctors signature)
- allow trustees to provide electronic notices to individuals where an appropriate electronic contact details are provided.

The implementation of the Protecting your Super reforms demonstrated, at scale, the issues with requiring paper communications. One FSC member estimated that the cost of required mail-outs to members regarding their insurance coverage as part of the implementation process was up to $800,000. Many funds also invested in electronic communications, and the industry invested in an online advertising campaign specifically to prompt individuals to open the letters they received in an effort to increase the expected low level of engagement.

The recently introduced *Treasury Laws Amendment (Your Future, Your Super) Bill 2021* entrenches this issue. Section 60E(5) explicitly requiring notices to be both posted and emailed to members, even where a valid email address is the usual method of communicating with a member or the fund knows that the last known mailing address for a member is no longer correct but has not been able to obtain a current address.

One FSC member has estimated that they have electronic contact details for approximately 80% of their members. For cohorts where the majority of members have directly joined by choice, rather than being default members, the rate is likely to be much higher as this information is likely to be collected at the time of joining and email is likely to be the preferred primary communication method.

While paper communications may still be required where a fund does not have electronic contact details for a member, this is an increasingly small number of members as more individuals choose to use electronic communication as their preferred way to interact with their superannuation fund.

Recommendation
Modify the Electronic Transaction Regulations to ensure communications under the SIS Act and SIS regulations are no longer exempt from the Electronic Transactions Act.

5.3 Cancellation requirements for risk only contracts of life insurance

The FSC notes there exists in current legislation differing requirements for how life insurance contracts may be cancelled and therefore communicated to policyholders. The long-standing position of the FSC is that a risk only contract of life insurance may be cancelled provided the process is consistent with the requirements of section 59 of the *Insurance Contracts Act 1984* (Cth) **(s59)**. A policy with an investment component gives rise to a surrender value and the surrender value may only be forfeited for non-payment of premiums consistent with the requirements of section 210 of the *Life Insurance Act 1995* (Cth) **(s210)**.

Section 210(5) sets out the process a life company must follow in order to validly forfeit a policy of life insurance with a surrender value. This provision originates from a time when life policies were typically whole of life and endowment policies, with an asset value constituting property that could be 'forfeited'. Current risk policies differ, as they do not have any value at the end of each period covered by a premium, and the life company's promises only continue to be effective if the next premium is paid on time.

This position is supported by commentary provided by Ian Enright and Rob Merkin in Sutton's Law of Insurance in Australia (Thomson Reuters, Sydney, 4th ed, 2015) (**Sutton's Law of Insurance in Australia**), and legal opinions from Mr Ian Jackman SC, dated 26 November 2015 and 15 December 2015 (collectively, the **Jackman Opinion**) which have been previously shared with Treasury *(the key relevant extracts are set out below).*

Sutton's Law of Insurance in Australia notes at 12.250:

> *Remarkably and unnecessarily, [the Insurance Contracts Act 1984] omits the failure to pay premium as a ground for cancellation on the basis that this ground is the subject of the Life Insurance Act 1995 s210. The better view is that s210 applies only to a policy with a surrender value. A surrender value is in an investment life insurance only.*

The Jackman Opinion dated 10 November 2015 relevantly notes:

> *17. First, sub-section 210(5) itself is confined to the concept of "forfeiting" a policy. As a matter of ordinary legal language, "forfeiture" refers to the loss or determination of a proprietary interest or right, rather than merely contractual rights: Legione v Hately (1983) 152 CLR 406 at 445 (Mason and Deane JJ); Kostopoulos v G. E. Commercial Finance Australia Pty Ltd [2005] QCA 311 at [53] (Keane JA, with whom McMurdo P and Dutney J agreed); Westminster Properties Pty Ltd v Comco Constructions Pty Ltd (1991) 5 WAR 191 at 197-8 (Malcolm CJ), 202-6 (Kennedy J). The more general term "cancellation" is apt to refer also to the termination of contractual rights. The distinction is preserved in the language of sub-section 59(3), which is part of a section dealing with cancellation, and recognises expressly that sub-section 210(5) is concerned with life policies that may be "forfeited".*
>
> *18. Second, sub-section 210(5) must be read in the context of section 210 as a whole, which begins in sub-section (1) with the forfeiture of policies where the "surrender value" exceeds the total of overdue premiums and any other amounts owed under the policy. As it is sub-section (1) which provides for the circumstances in which a policy is liable to be forfeited for non-payment of a premium, it is necessarily to be read together with sub-section (5) which provides the procedure for forfeiture for non-payment of premium. The section, read as a whole, is not concerned with risk-only policies, as they do not have any surrender value.*

However, due to unintended consequences as a result of previous legislative amendments, there exists uncertainty around whether the forfeiture notification process under section 210(5) applies to risk only policies (as well as to policies with an asset or surrender value) or whether they are covered by sections addressing policy cancellation under s59.

The FSC believes that the correct approach for the cancellation of risk only policies is to follow the process in s59. This is supported by the Jackman Opinion previously provided to Treasury.

We note the Australian Financial Complaints Authority's (**AFCA**) view is that the correct procedure for cancelling a life risk contract of insurance for non-payment of premium is set out in section 210(5) of the Life Insurance Act. AFCA's view is supported by Stanley Drummond in an article published in 2007 in the Insurance Law Journal and in Wickens The Law of Life Insurance in Australia, which is edited by Stanley Drummond.

AFCA's view was formalised in a 3 December 2020 draft approach paper on the cancellation of insurance policies for non-payment of premiums. We submit that AFCA has of its own volition decided to set its approach to the cancellation of policies for non-payment of premiums without due regard to the relevant legislative history and context, and the purpose of section 210 which in our view clearly relates to *forfeiture* of insurance contracts with a surrender or asset value.

The life insurance industry has been following the s59 cancellation procedure for risk-only life insurance contracts since the introduction of the *Insurance Contracts Act 1984*. As such life insurance companies have built their systems, processes and procedures in line with the s59 requirement. Since that time, there have been various legislative changes made that have created ambiguity around the correct application of s59 for life insurance contracts.

We again refer to the Jackman Opinion previously provided to Treasury for the full details, however, in summary, these changes were:

- The introduction of the *Life Insurance Act 1995* and accompanying *Life Insurance Regulations 1995*;
- Repeal of the *Life Insurance Regulations 1995* to coincide with the effect of *APRA Life Prudential Standard 360* on minimum surrender values for life contracts with an investment component; and
- The introduction of the *Insurance Contracts Amendment Bill 2013*.

Customer outcomes

Insurers have shown, both through their own COVID-19 financial hardship initiatives along with those undertaken by the FSC, as well as the general financial hardship obligations in the Life Code, a strong desire to afford a chance for customers to not lose their valuable cover (notwithstanding being behind on their premium obligations). It should not be lost that if s210 did apply to risk-only insurance contracts, that unfortunately the current flexibility, forbearance and options to help customers retain their cover will not be readily able to be provided under the technical and strict s 210 notice requirements. The requirements under s210 would mean that each time a customer is provided assistance or relief by the insurer (which is a discretion of the insurer) a new notice would be required.

In respect of the cancellation provisions for non-payment of premiums under s59 of the ICA, even without the application of hardship provisions, life insurers provide well in excess of the 28 days' notice required to cancel a policy for non-payment of premiums, with the majority of life insurers providing for over 60 days non-payment before cancelling a policy. The section also ensures insurers can provide customers with certainty in respect of outstanding premiums at any given time, including when those premiums are required to be paid before cancellation can occur. The use of s210 is very clumsy in this regard because it was never designed to contemplate the cancellation of non-investment life-risk insurance. It's about forfeiture of a policy which is something very different.

Recommendation
Make clear through legislative amendment that risk only life insurance policies may be cancelled in accordance with requirements of s59 of the Insurance Contracts Act for non-payment of premium.

5.4 Requirements to endorse policy documentation

We note the following sections in the Life Insurance Act 1995 which specify instances where the life company is required to endorse a policy:

- Section 200 of the Life Act provides that an assignment of the policy is not effective unless a memorandum detailing consent of the old policyholder, new policyholder and insurer is “endorsed” on the policy.
- Section 213 of the Life Act allows life companies to make a life insured a policy owner, if the original policy owner has died and the life insured satisfies the life company that they would be entitled to the policy proceeds under the policy owner’s will or probate rules. Once the life company is satisfied that the requirements are fulfilled, the life company must endorse on the policy a declaration that the life insured is the owner of the policy and can benefit from the proceeds.

Prior to life insurers keeping very sound electronic records, the requirement for each party to mark or “endorse” a policy document may have been an important safeguard for policy owners to keep the original insurance policy document. However, this requirement is now antiquated and no longer suited to modern practices and consumer preferences. Electronic storage whereby life insurers maintain accurate electronic systems and records is now the norm and ubiquitous.

Furthermore, the requirement to specifically endorse on the policy, whether done through physical or electronic means, places administrative burdens and costs on life companies and the life insured. We therefore consider the requirement offers no tangible benefit for its costs.

We submit that reassignments of life insurance policies would only still occur by completing the many other robust requirements, notably the section 200(2)(d) requirement for the assignment to be registered in a register of assignments kept by the life company (this requirement could be similarly extended for instances where section 213 applies).

Recommendation
Repeal endorsement requirements set out in Section 200(2)(b) and Section 213 of the Life Insurance Act to reflect current practices.

5.5 Requirements for issuing replacement policy documentation

Sections 221-225 of the *Life Insurance Act 1995* (**LIA**) constitute Part 10, Division 7---Lost or destroyed policy documents. In our view these provisions and the governance they mandate for the process for replacing lost or destroyed policy documents is out-dated and unduly cumbersome for modern requirements. The process can be lengthy and involve consumer cost.

Examples of the out-dated nature of these provisions are set out below.

- The life insurer has to be satisfied as to consumer evidence of loss of a policy document. If the insurer is not, an application can be made to court, on failure of the life insurer to issue the policy document (section 221). A replacement policy document must as far as possible copy the original, include any endorsements and state the reasons for its issue (section 222).

- If the claim value is in excess of $25,000 on the replaced policy, the life insurer is required to give notice of intention to issue a replacement policy document by way of newspaper advertisement (section 223) (see Addendum 2). This can be in a newspaper circulating in the district in which the policy owner resides or the district in which the insurer considers the original policy document to have been lost or destroyed. The applicant bears all the costs of advertisement and issue of the policy document, and they have to be paid up front (section 223(4)). The Part 10, Division 8 register must be updated to reflect the issue of the replacement policy document and the reasons for it.

- Similar advertising requirements apply in the case of loss or destruction of the original policy document where a claim under the policy is made under section 211, 212 or 213 (section 224).

These sections are in substantially similar form to provisions in the predecessor legislation, the *Life Insurance Act 1945* (Cth). In the 1945 Act[3], a life insurance company was similarly required to advertise when a consumer had lost or destroyed the policy document. The advertising requirement was a means of mitigating risks that arose if the policy document could not be produced by the consumer. This risk is primarily that the policy might have been assigned to another person. The requirement in the 1945 Act made sense in the context of the time:

- In the absence of computerised technology, the policy document issued by the life insurer comprised one document which served as the contractual document for the entire duration of the policy. The policy document was often on A3-sized (or comparatively large-sized) parchment. This reflected the relative lack of sophistication of insurance products at the time, where a consumer is likely to be covered for one type of insurance only (such as death cover only) for the entire duration of the policy.

    - In the event that the ownership of the policy was transferred to another person, the policy document was physically stamped or endorsed with details of the new owner. For example, if a policy ownership was transferred to **seven** different persons in succession during the duration of the policy, the policy document would have (at least) **seven** endorsements on the document itself with details of each owner. Again, until computerised technology became available, the physical endorsement on the policy document was one of the limited means of proving who was the owner of the policy at a particular point in time;

- Newspapers were the most likely method by which the general public could be notified.

[3] S119 Life Insurance Act 1945 (Cth)

Technological advances have meant that the print media has far less significance as a news channel than when the Life Insurance Act commenced. In practice now, some of the requirements associated with this for life insurers are:

- Preparing correspondence for newspaper advertisements
- Collecting a replacement policy fee
- Managing the 10 day waiting period – the minimum 10 day waiting period (in which the insurer must notify its intention to replace a policy document) is regularly the subject of customer complaint.
- Mailing the client

Importantly, the expense associated with advertising a lost policy in a newspaper is charged back to the consumer. One of the triggers for producing a policy document (and advertising if it cannot be produced) is in certain claims circumstances, specifically death claims. We submit that it is inappropriate for a consumer (or dependants) and life insurance company to be required to bear the expense of advertising that does not serve any beneficial purpose. It is even more inappropriate that this expense should occur that the time of a death claim, when a consumer's dependants are possibly least able to afford it. It is also inappropriate that the payment of a death claim should be delayed by advertising a lost document where such advertising serves no beneficial purpose.

In the 26 years since the current LIA commenced, technological advances have greatly reduced the reliance on paper as the sole source of identification and evidence of a life insurance policy. The concept of a lost or destroyed policy document has ceased to be relevant, and there is no legislative or economic basis for retaining Part 10, Division 7 in the LIA. To overcome this, life insurers should maintain their own records of policy documents they issue electronically. Section 74 of the ICA requires insurers to provide to insureds a statement of all the provisions of the contract on request. Failure to do so is an offence attracting 300 penalty units. We feel the law here adequately protects consumers.

Recommendation
Repeal Part 10, Division 7 for sound legislative and consumer reasons. The widespread use of e-technology across all forms of business activity has rendered the paper-based thrust of Part 10, Division 7 anachronistic. The onus is on insurers to maintain availability of policy terms.

5.6 War exclusions can be void

Section 229 of the Life Act makes war exclusions for death cover void unless there is written on the policy document an acknowledgement signed by the person to whom the policy is issued that the policy is subject to the term or condition.

The provision is historical and is no longer in keeping with current practice. A requirement for a signed acknowledgement on the policy document does not work with the way insurance policies are sold and administered today. Most applications are completed electronically and any exclusion is provided in either the product disclosure statement (**PDS**) or in the policy schedule. The PDS must be provided prior to sale and any additional exclusion applied at underwriting needs to be agreed by the policy owner.

Recommendation

Repeal Section 229 of the Life Insurance Act to reflect the electronic completion of applications.

6. Record keeping requirements

6.1 Technology-neutral compliance with the Best Interests Duty in the Corporations Act

As noted in the Appendix of the FSC's submission on *ASIC Consultation Paper 332: Promoting access to affordable advice for consumers*, advisers have a statutory duty to act in the best interests of their client. Section 961B(2) of the Corporations Act provides that an adviser will satisfy that duty if they can *prove* that they have met each of the safe harbour steps set out in that subsection. This has created an undue focus on creating a body of evidence to demonstrate that the safe harbour steps have been met. There needs to be an adjustment to focus more on the outcome of the advice (i.e the appropriateness of the advice – section 961G) rather than documenting the process that has been undertaken to arrive at the advice (proving the advice with an appropriate level of documentation 961B).

Recording information to demonstrate compliance with the best interest duty takes time, and the more time taken to provide advice, the greater the cost. Other professions are not necessarily required to document and evidence their thinking to arrive at a recommendation or series of recommendations to the extent the advice industry is required to. The approach that in the absence of proof, the adviser has not acted in the client's best interests. The level of detail required in advice documents and working papers to evidence that an adviser has acted in the best interests of their client is significant, and thus time consuming. *RG 90 Example Statement of Advice* contains a few different scaled advice scenarios include the financial adviser application of the FASEA Code of Ethics, the industry has only one scaled advice example to model the Statement of Advice from.

Recommendation
Treasury should consider the role of technology-neutral laws to support efficient and effective compliance with the Best Interests Duty in the Corporations Act.

6.2 Removing barriers to direct online investment

FSC supports removing barriers to direct online investment in the Corporations Act. Lengthy processes are no longer appropriate in the 21st century where consumers increasingly prefer to purchase products and relate to service providers online.

Consumers would be better served by real-time electronic applications and investments in financial products, increasing retail customers access to investment. Given the increasing consumer preference to purchase financial products online, inefficient requirements, such as lengthy application forms, need to be modernised.

Section 1016A of the Corporations Act prevents a financial product from being issued to a retail client until an application form has been completed and processed. This means that financial products such as interests in Managed Investment Schemes **(MIS)** cannot be issued to an investor in real time despite advances in technology and online processing.

Accordingly, we have previously supported the Australian Securities Exchanges' **(ASX)** applications for relief from these barriers. While ASIC's Class Order CO 13/1621 provides relief for interests in managed investment schemes acquired through the ASX mFund Settlement Service, the FSC believes this relief should be extended to all managed investment schemes that are not available through the ASC mFund Settlement Service.

The narrow application of relief to simple MISs means less efficiency, choice and access for investors and issuers of MISs. It results in an inability for investors to access appropriate levels of diversification if they are solely investment via this channel.

Indeed, technology costs to facilitate the ASX mFund Settlement Service are significant. Unit Registry platforms are not historically connected to CHESS and the changes to core process (such as those surrounding the cash, settlement) add to the complexity and development expense. The connectivity with CHESS does not presently exist in the managed funds industry for most custodians and registrars. CHESS is a proprietary message set - ASX is acting as a secondary market intermediary in a primary market, accordingly the development costs associated with connecting to ASX mFund Settlement Service are additional costs that would be borne by the industry.

It appears that the development costs associated with registrars and potentially distribution support and wealth management software applications connecting to CHESS for AMFS are likely to be significant. With relief only provided to one provider, the costs could be higher than necessary. There is likely to be a large number of required messages (up to 100) for the service to operate.

The FSC therefore submits that permanent reform should be undertaken to revise the obligations to collect and process application forms so that retail investors can take advantage of electronic applications and the related efficiency and cost benefits. Straight through processing of electronic applications with simultaneous issuance of financial products should be permitted. This should apply to the entire wealth management industry, not just in relation to the ASX mFund Settlement Service. This would not affect existing consumer protection mechanisms in the Act including cooling off periods or additional disclosures for certain types of registered MISs such as mortgage or hedge funds. Furthermore, a Product Disclosure Statement would remain a mandatory disclosure requirement prior to issuance.

The financial services industry has the capability to deliver online services to investors that fulfil the policy objective of the s1016A(2) requirement to ensure that a retail investor is given a PDS before they are issued with products. Software in existence can provide an up-to-date library of all the PDSs of the schemes, to support giving an investor a contemporaneous PDS when the investor applies for products.

Investors would be able to apply for or redeem the admitted scheme products by interacting directly or through their financial adviser or dealer or wealth professional, who holds an AFSL, in one of two ways:

- Online - by submitting through the AFSL holder dealer or adviser automated client order system provided by the wealth management software or stockbroker; or
- Issuing instructions in person or by telephone, fax or email to the representative of the wealth professional, who then takes steps to execute the instructions through the wealth management system or stockbroker platform

The responsible entity will not be restricted from issuing without an application form if the Wealth professional (AFSL holder) involved with the order accepts responsibility to give the retail investor the current PDS or ensure the retail investor has been given the current PDS. An additional option would be that a digital signature is sent with the order. An application (or redemption) that is accepted will result in a payment (or receipt) via SWIFT, BECS, BPAY or direct credit and a corresponding increase (or decrease) in the investor’s primary registry holding balance of products in the admitted scheme.

Recommendation

Wholesale permanent relief from section 1016A of the Corporations Act should be provided on a competitively neutral basis – that is to issuers, platforms and other market participants via a secure electronic means, not just in relation to the ASX. This should also include funds which qualify under the Asian Region Fund Passport initiative in order to increase the availability of passport funds and ensure they can compete effectively with local funds.