

30 September 2016

Honourable Speaker and
President of the Legislative Council
Corner of North Terrace and King William St,
Adelaide,
South Australia 5000

BY EMAIL: michael.atkinson@parliament.sa.gov.au
russell.wortley@parliament.sa.gov.au

Dear Honourable Speaker and President of the Legislative Council,

Voluntary Euthanasia Bill 2016 (SA)(Bill): Potential life insurance issues

We appreciate being alerted to the provisions in the Bill that deal with life insurance.

The Financial Services Council (“FSC”) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and public trustees. The FSC has over 125 members who are responsible for investing more than \$2.5 trillion on behalf of 11 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 third largest pool of managed funds in the world.

The FSC and its members do not express any view on euthanasia and whether or not euthanasia should be supported by legislation. Nothing in this letter should be taken to be an expression of a view on, support for or non-support for, euthanasia. As such, our comments should not be taken as being supportive or otherwise of government policy, or the policy of any political party or individual Parliamentarian on the matter of euthanasia. Our comments are limited solely to the potential life insurance implications of clauses 23 and 28 of the Bill.

Our comments below are our initial views on the impacts of the Bill on the life insurance industry.

In providing the following comments, we emphasise that the interaction of State legislation concerning life insurance with federal legislation, such as the *Life Insurance Act 1995* and the *Insurance Contracts Act 1984*, is potentially a complex matter requiring careful legal analysis. In particular, the effect of section 109 of the Commonwealth Constitution is that where there is an inconsistency between State and Commonwealth laws, the law of the Commonwealth will prevail to the extent of the inconsistency. Specifically, section 109 provides as follows-

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

As such, we suggest that the insurance provisions be removed until such time as Members of the South Australian Parliament have had an opportunity to consider the complex legal issues of the proposals for insurance in this Bill. In any event, the Bill raises the following significant issues, concerns and implications for the life insurance industry.

In the time available, we have had an opportunity to undertake a high level review only of the Bill from an insurance perspective and our comments should be read in this light.

We make the following brief and initial comments on the Bill:

- ***Jurisdictional issues***

The jurisdictional application of the Bill in relation to contracts of life insurance is uncertain. In particular, the provisions of the Bill that are intended to apply to contracts of life insurance may only apply to contracts of life insurance that expressed to be subject to the laws of South Australia. Relevantly, we understand that most life insurance contracts are expressed to be subject to the laws of New South Wales, Queensland or Victoria, potentially resulting in the relevant provisions of the Bill having little effect.

In addition, we note that the proposed protection for insureds under clause 28 of the Bill is potentially inconsistent with current disclosure obligations of insureds under section 21 of the *Insurance Contracts Act 1984* (Cth). In summary, under section 21, an insured has a duty to the insurer, before the relevant contract is entered into, every matter that is known to the insured that is “*relevant to the decision of the insurer whether to accept the risk and, if so, on what terms*”. The effect of section 109 of the Constitution (see above) is that clause 28 of the Bill may therefore be invalid to the extent of any inconsistency.

Clause 28 also creates a risk of anti-selection for an insurer, who offers contracts of life insurance that are subject to the laws of South Australia, which ultimately results in an adverse cost impact for other policyholders with that insurer (anti-selection within a risk pool will increase the cost of insurance for all those in that pool).

- ***Retrospective effect***

It is not clear whether clause 28 will have a retrospective effect. If it does, this may have a negative and disruptive impact for insurers, who offers contracts of life insurance that are subject to the laws of South Australia, in terms of the pricing of insurance contracts, reinsurance arrangements, reserving and capital management. We do note that capital/prudential standards for insurers in Australia are set and supervised by the

Australian Prudential Regulation Authority (**APRA**). As such, APRA is likely to be interested in the potential impact of these provisions.

▪ ***Uncertainty***

The current drafting of the Bill from a life insurance perspective should be clarified in relation to practical application. Specifically, clauses 23 (cause of death) and clause 28 (Insurance) contain wording which is potentially ambiguous.

In particular, it is unclear how clause 28 would apply to non-medically underwritten life policies which operate via a 'pre-existing conditions' clause. In these cases, a claim may be denied on the basis of an existing condition, which may ultimately be the reason for exercising the option of euthanasia. Therefore, a claim citing this condition as the cause of death may be declined.

The Bill in clause 23 states in relation to cause of death that
For the purposes of the law of this State, **and for any other purpose...** (our emphasis)

It is not clear to us how this contention interacts with the Commonwealth legislation we have mentioned and can have operation where the law governing the life insurance contract is that of another jurisdiction, for example, New South Wales or Victoria. These are complex issues of constitutional and private international law which need to be considered in some further detail.

In addition, clause 23 goes on to provide that a death resulting from a voluntary euthanasia request-

- (a) will be taken to have been caused by the medical condition primarily responsible for the person's unbearable and hopeless suffering;*
- and*
- (b) will be taken not to be suicide or homicide.*

Similar issues arise here. The provisions of Clause 28 raise similar concerns.

FSC would be very grateful if you could advise further as to the progress of this Bill through the South Australian Parliament. We encourage our comments to be passed on to other South Australian Members of Parliament and to the Crown Solicitor's Office.

Our comments are an indication only of some of the issues raised by the Bill but are not a comprehensive statement of all of the potential implications of the Bill for the life insurance industry.

If timing and events permit, the FSC would be happy to provide a more detailed brief for South Australian Parliamentarians on the insurance matters raised above.

Please feel free to contact me on (02) 9299 3022 if you have any questions or wish to discuss our initial comments on the life insurance impacts of the Bill.

Yours Faithfully,



Paul Callaghan
General Counsel