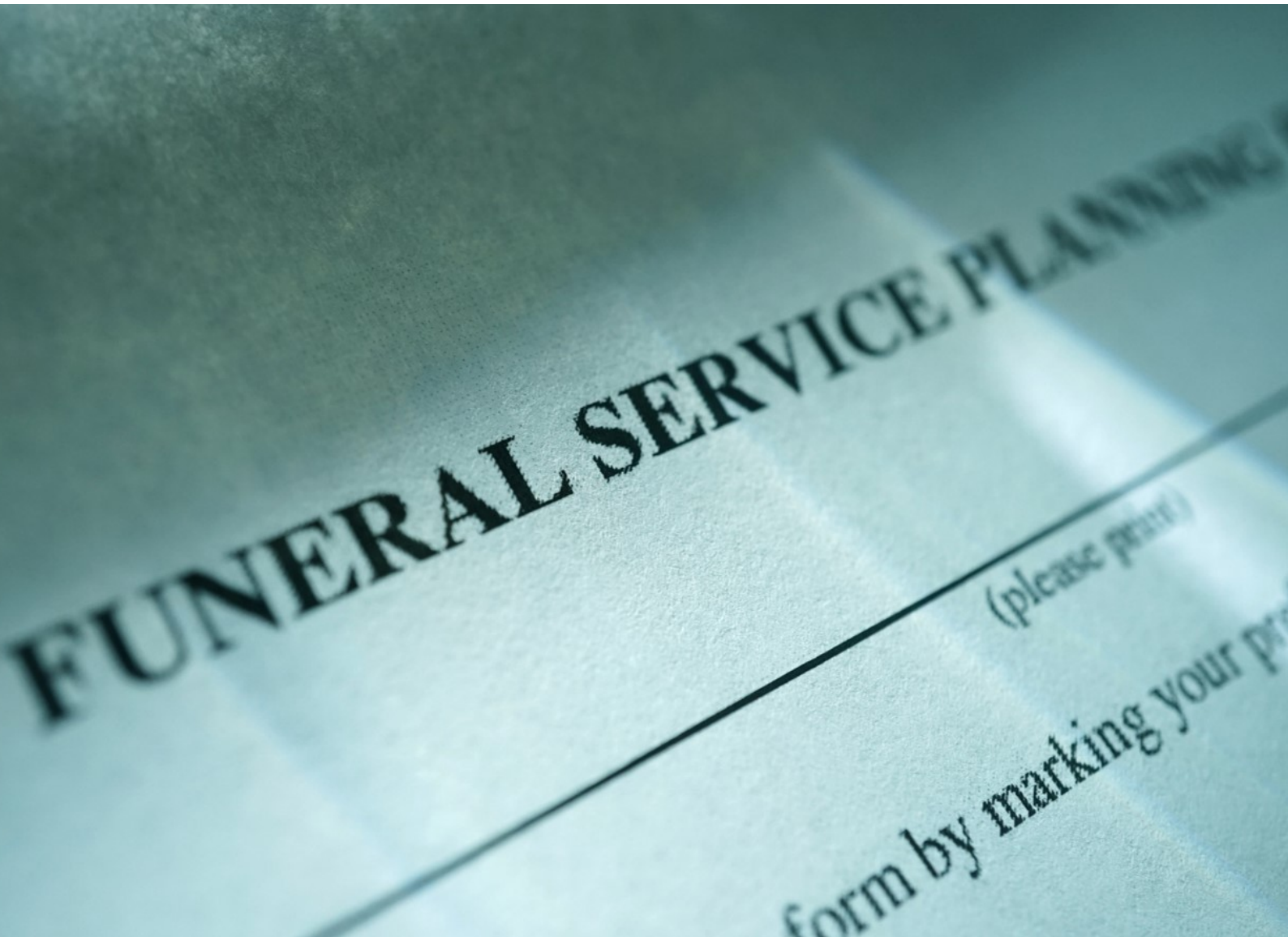
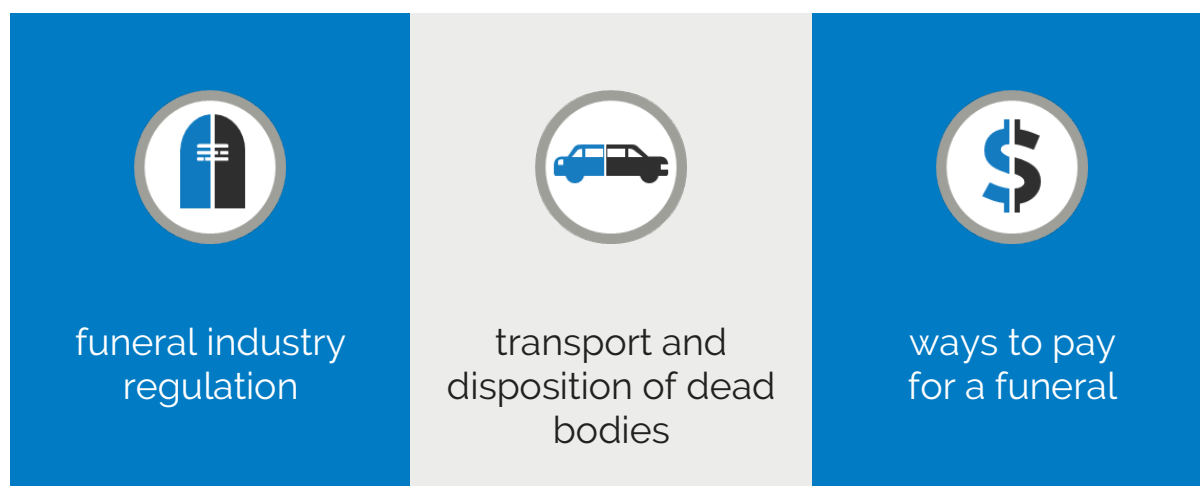


REVIEW OF THE FUNERAL INDUSTRY IN NSW
REGULATION AND LICENSING
INFORMATION PAPER



In submissions to our review, some industry and consumer stakeholders called for more regulation of funeral activities, including licensing of funeral providers. These stakeholders argued that more stringent regulation will improve or guarantee the funeral industry's service standards.

We looked at current regulatory arrangements in 3 areas – funeral industry regulation, transport and disposition of dead bodies, and ways to pay for a funeral.



For each area, we considered stakeholder views, then analysed the need for and the suitability of the existing regulation in each of these areas using the IPART licensing framework (see Box 1 for more information).

We concluded that there is a need for ongoing regulation in each area and the existing regulatory arrangements are largely fit for purpose and appropriate. In particular, we found:

- ▼ **There is no need for additional regulation or licensing of the funeral industry as an occupation, but compliance with existing regulation must be enforced.** We consider the funeral information standard is justified to address the lack of information consumers would otherwise experience in dealing with funeral providers. But the relatively low level of compliance with the standard is limiting its effectiveness. We are recommending that NSW Fair Trading continue to audit funeral provider websites and take enforcement action for non-compliance.

We also consider that the competitive funeral market is already providing high industry standards. Licensing and additional regulation would add to the costs of the industry, impede innovation and not support competition, choice or affordability in the funeral market.

- ▼ **There may be scope for reduced regulation of the transport and disposition of the deceased.** We consider some of the specific provisions in the *Public Health Regulation 2012* may not be justified by the risk of harm to public health. We are recommending NSW Health consider this issue when this regulation is reviewed prior to statutory repeal later this year.

- ▼ **There is no need for additional regulation of ways to pay for funerals, but there is scope for further improvements to consumer education in this area.** We consider the recently strengthened regulatory arrangements in this area are appropriate and effective (or likely to be effective where they have just been introduced). These arrangements include greater regulation of funeral insurance sellers to protect vulnerable consumers, and new powers for ASIC to intervene in products where there is a risk of consumer harm. The NSW and Australian governments have also increased consumer education about funeral insurance and other payment issues. We are recommending the NSW Government and NSW Fair Trading make further improvements in this area.
- ▼ **There is insufficient justification for a single funeral industry regulator,** as some stakeholders have called for. In our view, it is more effective for funeral consumer issues to be dealt with by NSW Fair Trading, funeral-related health issues to be dealt with by NSW Health, and funeral financial issues to be dealt with by financial regulators.

Box 1 The IPART licensing framework

In 2013-14 IPART reviewed licence rationale and design in NSW and developed a framework for assessing (both existing and proposed) licences. The NSW Government Guide to Better Regulation requires agencies to use the IPART licensing framework when proposing a new or revised licence.

Step 1 of the licensing framework: Consider the need for Government intervention.

Firstly, consider potential **policy rationales** for Government intervention. At least one of the following rationales must be present:

- ▼ lack of information
- ▼ impacts on third parties
- ▼ existence of market power
- ▼ potential for misconduct
- ▼ lack of property rights
- ▼ public goods
- ▼ broader policy objectives.

Secondly, consider these **factors**, all of which must be present:

- ▼ risk of detriment is high (considering size of detriment, likelihood of detriment, and vulnerability of population the detriment might affect), and
- ▼ ability to remedy is poor (the detriment is irremediable, financial remedies are inadequate, or available remedies are too costly or time-consuming), and
- ▼ the market is unlikely to provide an adequate response.

Step 2: Assess whether something else addresses the problem already.

Step 3: Consider whether there is an ongoing need for specific regulation in this area.

Step 4: Consider whether licensing is still required to address the policy objectives.

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Source: IPART, *A best practice approach to designing and reviewing licensing schemes – Guidance material*, March 2013

Funeral industry regulation

Most funeral industry regulation is state-based, and the scope and content of these regulations varies widely between states. Funerals are also subject to general consumer law.

Current funeral industry regulation

NSW and Victoria introduced similar information disclosure requirements for funeral providers about 10 years ago; Victoria linked theirs to a requirement for funeral providers to register with Consumer Affairs Victoria, while NSW did not require registration. NSW changed the information requirements to include itemised publication of prices on a website in 2019 (the current funeral information standard).

Queensland has a (voluntary) funeral industry code of conduct administered by the Office of Fair Trading.

WA has the most stringent industry requirements for funeral providers, with licensing through the Metropolitan Cemeteries Board or local councils, and a compulsory code of conduct. Licences must be renewed annually for a fee.

There is no evidence of a higher level of complaints about funerals or concerning behaviour from funeral providers in states with less stringent requirements than WA.



In NSW, funeral providers are not required to be registered or licensed.

What stakeholders said about funeral industry regulation

Some traditional funeral providers submitted that regulation of the industry is required to ensure maintenance of minimum standards.ⁱ Some take the view that licensing and regulation are necessary to protect consumers from “less desirable individuals” entering the profession.ⁱⁱ However, given the low level of complaints about funeral providers, and the application of general consumer law to funerals, we do not consider that there is sufficient evidence of poor behaviour that would be addressed by regulation or licensing.

Funeral providers also submitted that price disclosure regulation focused consumers “too much” on pricing, and did not allow them to take into consideration service quality differences.

Some consumers have also called for licensing and/or regulation of funeral providers,ⁱⁱⁱ although consumers and consumer representatives tended to focus on regulation of information, rather than of standards.^{iv}

Rationale for government intervention in industry regulation

We found the following possible policy rationales for government intervention in funeral industry regulation:

- ▼ **Lack of information.** Given the nature of the funeral market, with infrequent purchases, time pressure at point of purchase, and the emotional nature of the purchase, there is significant information asymmetry between consumers and providers.
- ▼ **Existence of market power.** Concerns have been expressed around InvoCare's market share.
- ▼ **Potential for misconduct.** Traditional funeral providers submitted that there was potential for misconduct if funeral providers are not required to have a specified asset base.
- ▼ **Social policy objectives.** People expect a level of respect, dignity and compassion when dealing with death and bereavement that does not apply to other consumer goods.

For each of these policy rationales, we found that two of the three factors for consideration were present:

- ▼ risk of detriment is high (considering size of detriment, likelihood of detriment, and vulnerability of population the detriment might affect)
- ▼ ability to remedy is poor (the detriment is irremediable, financial remedies are inadequate, or available remedies are too costly or time-consuming).

However, we found that the market is likely to provide an adequate response to the social policy objective of funerals being conducted with respect, dignity and compassion, as well as minimising misconduct.

The market is providing high industry standards so there is no need for the government to intervene

The argument being mounted by industry (and some consumers) is that licensing is required to preserve quality standards, which for traditional model providers tends to focus on equipment standards, and for consumers tends to be more about less tangible aspects such as respect, dignity and compassion – feeling as if they have had “a good experience”. However, our view is that the market is providing these standards, without need for additional intervention by government.

For example, from the industry perspective, we consider that industry already does a good job of differentiating product based on quality (and it is in their commercial interests to do so). In consultation and submissions, traditional providers frequently reiterated that customers chose them because they value the service quality being provided, and were not only concerned about price.

From a consumer perspective, the funeral industry has a low number of complaints, so there is little evidence that, absent regulation, behavioural standards are lower. The Combined Pensioners & Superannuants Association (CPSA) (which would like to see stronger price protection for consumers) nevertheless submitted regarding standard and conduct regulation:

On the upside, the Department of Customer Service has resisted industry pressure to impose mandatory registration and accreditation of operators and a mandatory set of industry standards and code of conduct.

The industry says that its main motivation in pressing for mandatory registration is consumer protection from “fly-by-night operators”, as industry representatives call funeral providers who “operate out of a briefcase”.

It is obvious that the industry in making these claims is less interested in consumer protection than in putting up barriers to new entrants and minimising competition. It should also be noted that the consumer complaint rate has been low for many years despite the industry being reportedly swamped by these fly-by-night operators.

CPSA has on a few occasions asked industry representatives for an example list of these operators but has never been presented with such a list.^v

Existing regulations address residual concerns about industry regulation

In some cases regulation is generic, and in others it is funeral industry-specific.

- ▼ **Lack of information.** The funeral information standard in the *Fair Trading Regulation 2019*, which requires funeral providers to publish itemised prices on their websites and at their place of business, addresses the information gap that consumers otherwise experience if they have to approach funeral providers individually and in person to find out what they charge for a funeral.
- ▼ **Existence of market power.** The ACCC has powers to assess mergers and acquisitions.
- ▼ **Potential for misconduct.** Funeral providers are subject to consumer law in the same way as other providers of goods and services.

The funeral information standard must be enforced to fully achieve its objective

We consider that the specific regulation of provision of funeral information is well justified and there is an ongoing need for it.

However, all funeral providers need to comply with the standard for it to be effective. As we discuss in our [information paper on pricing](#), only about two thirds of funeral providers display any price information on their websites, and less than half are fully compliant with the information standard.



Draft Recommendation

- 7 That, to improve compliance with the funeral information standard in the *Fair Trading Regulation 2019*, NSW Fair Trading continue to audit websites and commence enforcement action for non-compliance.

Transport and disposition of the deceased

Most regulation of body transport and disposition is state-based, and the scope and content of regulation varies widely between states.

Current regulation of transport and disposition of the deceased

All states except Queensland have some specific regulation of disposition of dead bodies, much of it focused on interment rights and arrangements for burial – for example, minimum burial depth, requirement for a coffin or other receptacle. NSW has the most stringent requirements for transfer and handling of bodies prior to disposition – for example, mortuaries must be registered with NSW Health, and bodies must be placed in a coffin in a mortuary.



In NSW, mortuaries must be registered with NSW Health, and a body must be placed in a coffin in a mortuary.

There is no evidence of a higher level of complaints or concerning behaviour with respect to transfer and disposition of bodies in states with lower levels of regulation than NSW.

What stakeholders said about regulation of transport and disposition of the deceased

Tender Funerals¹ submitted that the requirement to use a mortuary to place a body in a coffin is unnecessary and adds to the cost of funerals.

Others in the industry submitted that obtaining planning permission to establish a mortuary is a barrier (and a significant cost) to entry, yet traditional funeral providers (and the industry associations) consider an in-house mortuary essential to the provision of a funeral.^{vi}

¹ Tender Funerals is a mobile funeral provider which contracts out body transport and preparation.

Rationale for government intervention in regulation of transport and disposition of the deceased

We found that the main policy rationales for government intervention in regulation of transport and disposition of the deceased is the risk of impacts on third parties. There could be detriment to third party human or environmental health as a result of unsafe handling of bodies. Another rationale is the social policy objective that the bodies of people who have died should be treated with respect and dignity.

We found that the three factors for consideration were present:

- ▼ risk of detriment is high (considering size of detriment, likelihood of detriment, and vulnerability of population the detriment might affect)
- ▼ ability to remedy is poor (the detriment is irremediable, financial remedies are inadequate, or available remedies are too costly or time-consuming)
- ▼ the market is unlikely to provide an adequate response.

Existing regulations address concerns about regulation of transport and disposition of the deceased

Generic Work Health and Safety legislation, public health legislation and environment and planning controls all address the potential impacts of transport and disposition of the deceased. As noted above, NSW Health also has specific requirements for disposition of the deceased set out in the *Public Health Regulation 2012*.

Is there an ongoing need for specific regulation in this area?

The case for ongoing specific regulation of public health impacts (i.e. registration of mortuaries with NSW Health, or prescriptive requirements regarding treatment of bodies (such as placing in coffins only in mortuaries, and prohibitions on burying in a shroud) may not be justified by the risk of harm and could perhaps be left to generic public health, Work Health and Safety and planning legislation (as they are in Victoria and Queensland).

The *Public Health Regulation 2012* which regulates disposition of dead bodies is due for statutory repeal on 1 September 2021. This provides an opportunity to consider whether the requirements relating to mortuaries and handling of bodies remain justified on public health grounds.

For example, specification of grave depth and specification of material to be used in coffins are arguably not public health issues. Additionally, although the regulation currently requires a body to be buried in a coffin, exemptions are readily available for communities or religious groups whose beliefs and traditions require shroud burial rather than coffin burial. It would be timely to consider whether the coffin requirement is still meeting public health objectives.

We recommend that NSW Health consult on these provisions during remaking of the Public Health Regulation to ensure that there is an ongoing need for them.



Draft Recommendation

- 8 That NSW Health remove from the Public Health Regulation any provisions regarding body disposition that they consider unnecessary to protect human health when the regulation is reviewed prior to statutory repeal.

Regulation of ways to pay for a funeral

The Commonwealth Government regulates the provision of funeral insurance, funeral bonds and other credit payment systems; all states regulate pre-paid funeral contracts at a state level. This is an area that has attracted a lot of attention in recent years, most recently from the 2019 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Banking Royal Commission) which made a range of recommendations to strengthen regulation of funeral-related financial products, which the Commonwealth Government has implemented.

Current regulation of ways to pay for a funeral

A pre-paid funeral contract involves paying upfront at today's prices for a funeral package from a particular provider in one lump sum or several instalments. On death, the funeral provider must provide the services that have been agreed to.

The NSW Government regulates the provision of prepaid funeral contracts under the *Funeral Funds Act 1979* and the *Funeral Funds Regulation 2016*. Other states have similar instruments.

The Commonwealth Government regulates the provision of funeral insurance, funeral bonds, and other credit payment systems, including buy now, pay later (BNPL) platforms.

A **funeral bond** is an investment product that allows people to set aside money for a funeral on a regular basis, to be held as a bond and paid when the funeral is required. Funeral bonds are exempt from some Centrelink assets tests but cannot be withdrawn early. On death, the estate receives the funds that have accumulated, whether or not they are sufficient to pay for the funeral. There is an upper limit on funds that can be accumulated in a funeral bond set by the Commonwealth Government.

Funeral insurance is an insurance product where regular premiums are payable for a specified sum insured which is paid out on death. If a customer misses a premium payment, the insurance can be voided, and no money is returned. If death occurs soon after taking out such insurance, the payout will exceed the amount paid in; conversely, if someone takes out funeral insurance and then lives for many years, they may pay much more in premiums than the death benefit.



In 2020 the Commonwealth Government strengthened protections against unsolicited and aggressive sales of funeral insurance, particularly to vulnerable consumer groups, as recommended by the Banking Royal Commission.

Only licensed entities can offer funeral insurance and bonds. In addition, all licensed entities that offer funeral insurance subscribe to the voluntary Life Insurance Code of Practice, which sets out a framework for professional behaviour and high standards of service to consumers. This includes strengthening ASIC's powers to approve industry codes of conduct, and to take legal action against insurers who engage in predatory sales tactics.

What people said about regulation of ways to pay for a funeral

Stakeholders raised some concerns with pre-paid arrangements, including:

- ▼ being overcharged and underserved by these payment arrangements, with confusion about what is and what isn't paid for under the contract^{vii}
- ▼ contracts containing misleading and confusing terms about cash back options, plans ending at a certain age and inclusions/exclusions^{viii}
- ▼ confusion about the arrangements that apply if a funeral provider goes out of business or the person moves interstate.^{ix}

Stakeholders expressed strong views that funeral insurance generally delivers poor consumer outcomes and suggested that the government should do more to protect consumers from unscrupulous sales practices and terms. The Council on the Ageing surveyed members and submitted that many respondents who had purchased funeral insurance believed they had been misled in purchasing, and trapped into continuing to pay.^x

Rationale for government intervention in regulation of ways to pay for a funeral

The potential policy rationales for government intervention in regulation of ways to pay are:

- ▼ **Lack of information.** Consumers may not understand how to assess whether a particular financial product is suitable for them.
- ▼ **Potential for misconduct.** There is potential for significant financial misconduct in sale of insurance products and long-term investments like pre-paid funerals and funeral bonds.

We found that the three factors for consideration were present:

- ▼ risk of detriment is high (considering size of detriment, likelihood of detriment, and vulnerability of population the detriment might affect)
- ▼ ability to remedy is poor (the detriment is irremediable, financial remedies are inadequate, or available remedies are too costly or time-consuming)
- ▼ the market is unlikely to provide an adequate response.

Existing regulations address concerns about ways to pay for a funeral

The regulatory arrangements and consumer education in relation to funeral-related financial products have recently been strengthened. We consider these arrangements effectively address the need for government intervention in this area, (or will effectively address this need where they have only been recently introduced). In particular:

- ▼ Regulation of funeral insurance sellers has been increased to protect vulnerable consumers in response to recommendations by the Banking Royal Commission
- ▼ ASIC has been given new powers to intervene in products where there is a risk of consumer harm
- ▼ The NSW and Commonwealth governments have increased consumer education about funeral insurance
- ▼ A national strategy has been implemented to address key consumer issues in indigenous communities.

The Banking Royal Commission recommended greater regulation of funeral insurance sellers to protect vulnerable consumers

In 2019, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Banking Royal Commission) found that funeral insurance policies sold directly to consumers were of little value. It observed that in 2014, of 430,000 policies covering 740,000 lives, 12,500 claims were paid out, which was about a third of the value of premiums collected over the same period. Further, there was a high rate of policy cancellations, with high cost of premiums being the most common reason for cancellation.^{xi}

The Banking Royal Commission found that:

- ▼ premiums are likely to be 'stepped', increasing with age

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- ▼ many policies have the potential for consumers to pay more in premiums over the life of the policy than they will receive when they die
 - ▼ Aboriginal and Torres Strait Islander people are particularly likely to be sold policies that are not in their interests.

The Banking Royal Commission recommended that:

- ▼ funeral expense policies² should be subject to the same regulation as other financial products and the Corporations Regulations should be amended to remove the current carve out of these products
- ▼ the ASIC Act should be amended to put beyond doubt that the consumer protection provisions do apply to such policies and thereby prohibit unsolicited sale of these products.

The Commonwealth Government agreed to implement these recommendations and introduced the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Bill 2019* (passed by Parliament on 6 February 2020) and the *Treasury Laws Amendment (Financial Services Improved Consumer Protection) (Funeral Expenses Facilities) Regulations 2019* (in force from 1 April 2020).

ASIC has new powers to intervene in products where there is a risk of consumer harm

The Government introduced the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019* to mandate greater product disclosure of financial products and enable ASIC to intervene in the sale of products where there is a risk of significant consumer harm. These changes came into force in April 2020.

Since then, ASIC has taken legal action against Youpla, formerly known as the Aboriginal Community Benefit Fund, for making false marketing presentations to Aboriginal customers who bought the products thinking it was designed to benefit the community.^{xii}

In 2020, ASIC also banned unsolicited telephone sales of direct life insurance products, including funeral insurance. The ban aims to address poor sales practices that have led to unfair consumer outcomes in line with other recommendations from the Banking Royal Commission.^{xiii}

² Funeral expense policies charge premiums like other life insurance products, but only pay out on receipts for funeral-related expenses (up to a previously agreed amount). Other funeral insurance policies pay out a pre-specified amount to the beneficiary to spend as they see fit.

The NSW and Commonwealth governments have increased consumer education about funeral insurance

Since 2015, both the Commonwealth and NSW governments have taken action to reduce the potential for consumers to be misled by advertising or product disclosure, and to ensure they can make informed decisions about funeral insurance and other pre-payment products.

NSW Fair Trading and ASIC's Moneysmart websites provide factual information, case studies and cautions about funeral insurance and other funeral payment products. In 2019, consumer organisation Choice also published a series on funeral payment products. The Gathered Here website also includes a comprehensive guide on funeral payment options for consumers.

ASIC's Moneysmart website also includes a comparison tool that compares claims and claims related disputes performance for different types of life insurances, including funeral insurance.

The National Indigenous Consumer Strategy aims to address key consumer issues in indigenous communities

In 2018-19, the Commonwealth Government implemented a campaign to educate and empower indigenous consumers to avoid being taken advantage of through scams, financial services and trading practices amongst other issues.^{xiv} As part of this, NSW Fair Trading ran a campaign called 'It's ok to walk away' to empower Aboriginal consumers to not be pressured or misled into making a purchase or signing a contract for goods or services they may not want or can afford.^{xv} This includes funeral insurance and funeral expense policies.

Is there an ongoing need for specific regulation in this area?

The specific regulation of funeral insurance, pre-paid contracts and other financial instruments is well-justified and there is an ongoing need for them. Given the recent introduction of strengthened legislation, we recommend enhanced consumer information and education to make people aware of the legislation and their rights and responsibilities as consumers.



Draft Recommendations

- 9 That NSW Government websites with funeral information include information about (or links to Commonwealth information about) enhanced financial regulation, and consumer rights and responsibilities with respect to funeral financial products.
- 10 That NSW Fair Trading prioritise consumer education about funeral insurance and funeral products, including the existing 'It's ok to walk away' campaign with Aboriginal consumers.

Should there be a single regulator for cemeteries, crematoria and funerals?

Some stakeholders have called for a single regulator of all matters pertaining to cemeteries, crematoria and funerals.^{xvi} This is the same as the WA model, where the Metropolitan Cemeteries Board is the single regulator (and has been since the 1890s). In Victoria, all cemetery-related matters are overseen by the Department of Health and Human Services, but funeral information and funeral provider registration are managed by Consumer Affairs Victoria. In NSW, Cemeteries and Crematoria NSW is the cemetery industry regulator, but it has not developed any regulatory instruments yet. No other state has an industry regulator.

In our view, there is insufficient justification for a single industry regulator – it is more effective for funeral consumer issues to be dealt with by NSW Fair Trading, funeral health issues to be dealt with by NSW Health and funeral financial issues to be dealt with by financial regulators.

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- i For example, Euro Funerals submission to Issues Paper, December 2020, p 1.
 - ii For example, Funeral Directors Association of NSW (FDANSW) submission to Issues Paper, December 2020, p 11.
 - iii For example, P. Vines submission to Issues Paper, December 2020, p 2.
 - iv For example, Choice submission to Issues Paper, December 2020, p 2.
 - v CPSA submission to Issues Paper, December 2020, pp 3-4.
 - vi For example, FDANSW submission to Issues Paper, December 2020, p 11.
 - vii Council on the Ageing submission to Issues Paper, December 2020, p 15.
 - viii P Roper submission to Issues Paper, December 2020, p 1.
 - ix Council on the Ageing submission to Issues Paper, December 2020, p 16.
 - x Council on the Ageing submission to Issues Paper, December 2020, p 16.
 - xi Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1, pp 285-286.
 - xii See 20-262MR ASIC commences proceedings against ACBF Funeral Plans and Youpla Group concerning funeral expenses insurance, October 2020.
 - xiii See ASIC, <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-335mr-asic-to-ban-unfair-cold-call-sales-of-direct-life-insurance-and-cci/>, Media release, accessed 29 January 2021.
 - xiv See ASIC, Media release, <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-335mr-asic-to-ban-unfair-cold-call-sales-of-direct-life-insurance-and-cci/>, accessed 29 January 2021.
 - xv See NSW Fair Trading, [It's ok to walk away](#), accessed 12 February 2021.
 - xvi For example, FDANSW submission to Issues Paper, December 2020, p 9.