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Dear Madam/Sir

Review into Interment Costs and Pricing in NSW (Review)

We herein make submissions to the Independent Pricing and Regulatory Tribunal (**IPART**) in response to the recommendations contained in the Interim Report delivered in December 2019 (**Interim Report**) with regard to costs and prices for interment services in New South Wales (**NSW**) cemeteries.

1 Professional background

I head up the Sydney Charity and Not-for-profit team at Mills Oakley. My practice has a focus on not-for-profit organisations.

I act for numerous charities, religious, community groups, professional associations and not-for-profit organisations. I have over 25 years' experience in the legal profession.

I have extensive experience in the cemeteries and crematoria industry. This includes:

- (a) being a member of the Cemeteries & Crematoria NSW Consultative Group;
- (b) nine years' service on the board governing the Catholic Metropolitan Cemeteries Trust;
- (c) drafting the 'Guide to the Cemeteries & Crematoria Act (NSW) 2013';
- (d) drafting the 'Cemeteries & Crematoria Legislative Guide 2016';
- (e) presenting on several occasions at the Australasian Cemeteries & Crematoria Association National Conference; and
- (f) advising various cemetery operators on legislation governing the industry across Australia.

2 Summary

Our submissions address the following recommendations:

2.1 Acquisition of land:

- (a) Recommendation 1: Cemeteries and Crematoria NSW (**CCNSW**) be made responsible for acquiring land for new cemeteries in Sydney as part of the statutory review of the *Cemeteries and Crematoria Act 2013* (NSW).

- (b) Recommendation 2: New cemeteries in Sydney have their operations competitively tendered out to either an existing Crown land manager or appropriately qualified private operator.
- (c) Recommendation 3: The NSW Government work in partnership with councils in a coordinated strategic manner to identify land for interment outside Sydney.

2.2 Perpetual maintenance:

- (a) Recommendation 6: There be a legal obligation on all cemetery operators to make adequate financial provision for perpetual maintenance of interment sites and the cemetery.
- (b) Recommendation 7: Cemetery operators that conduct more than 50 bodily interments in new perpetual interment sites per year at a cemetery must contribute to an independently managed perpetual maintenance reserve fund to provide for long-term cemetery maintenance.
- (c) Recommendation 8: The perpetual maintenance reserve fund for a cemetery must be independently managed by Treasury Corporation or an independent body approved by CCNSW.
- (d) Recommendation 9: CCNSW to develop Guidelines on when and how a cemetery operator can use perpetual maintenance funds for a cemetery.

2.3 Publication of pricing:

- (a) Recommendation 11: To make it easier for consumers to compare and understand prices for bodily interment services, cemetery operators be required by regulation to publish prices for all bodily interment services on a consistent basis.
- (b) Recommendation 12: Within 12 months CCNSW to develop a central website to enable consumers to compare prices for interment services in one place.
- (c) Recommendation 13: In setting interment fees and charges, all cemetery operators should include future maintenance costs of their cemeteries.

Our submissions in relation to these recommendations are below.

3 Submission

3.1 Acquisition of land

Recommendation 1: CCNSW be made responsible for acquiring land for new cemeteries in Sydney as part of the statutory review of the Cemeteries and Crematoria Act 2013 (NSW).

As identified by the Interim Report, the absence of a consolidated development approach for new cemeteries has contributed to a highly competitive land acquisition market characterised by price distortion.¹ Cemetery operators who are forced to acquire land at exorbitant prices necessarily pass these costs onto consumers.

Accordingly, we agree with the principle behind the Interim Report's first recommendation to centralise the process for identifying new cemetery land, in that it will reduce competition and increase efficiency in an industry dealing with mounting economic and practical pressures.²

However, the proposal that CCNSW should be made solely responsible for acquiring new cemetery land does not adequately address the expertise and flexibility that is

¹ Independent Pricing and Regulatory Tribunal New South Wales, *Review of the Costs and Pricing of Interment in NSW* (Interim Report, December 2019) (**Interim Report**), 5.

² *Ibid*, 29.

demanding by the cemetery land acquisition process. The effective identification and acquisition of land for use as a cemetery requires specialist planning, valuation, infrastructure and development experience, and accordingly should be the responsibility of a suitably qualified entity such as the Department of Planning, Industry & Environment.

Further, there is a considerable repository of existing land identification data that already ensures entities other than CCNSW are able to effectively govern the land acquisition process. For example, the reports prepared by the Greater Sydney Commission and Mr David Harley AM give clear demographic, geographic and planning indications of preferred cemetery locations to entities wishing to acquire land. Cemetery operators are also capable of commissioning private reports containing similar recommendations. In a highly competitive property market, entirely removing the land acquisition process from individual cemetery operators may prevent these operators from capitalising on important opportunities.

A solution that features both a consolidated land acquisition process and the flexibility demanded by a competitive property market may be an arrangement whereby cemetery operators submit a proposed land acquisition to the governing body for approval. The governing body may be comprised of CCNSW only, or of a panel of government and private organisations (potentially including CCNSW).

Recommendation 2: New cemeteries in Sydney have their operations competitively tendered out to either an existing Crown land manager or appropriately qualified private operator.

The necessity of a consolidated land acquisition process may remove the connection between the entity that acquires land for a new cemetery, and the entity that operates that cemetery. Accordingly, if the ability to acquire land for a new cemetery is to be taken away from cemetery operators in the first instance, we agree with the Interim Report's recommendation that a competitive tender process for the operation of the land be instituted.

Such a tender process should increase transparency. The Interim Report's pricing principles (and Recommendation 11) should encourage the development of comparable and accessible interment price points, which may then be submitted in the tender process by Crown land managers or appropriately qualified private operators. An operator's capability to develop and market new cemetery land is central to the tender process, and this capability will be clarified and made more competitive through the establishment of transparent pricing.

Recommendation 3: The NSW Government work in partnership with councils in a coordinated strategic manner to identify land for interment outside Sydney.

The Interim Report contains a number of findings focused on the dominance of local councils as cemetery operators outside Sydney.³ As outlined in Chapter 4, local government performs 84% of the burials that take place in the rest of NSW.⁴

We request further explanation of the recommendation that NSW Government work in partnership with councils to identify land for interment outside Sydney. It appears as if the recommendation focuses on a partnership between the NSW Government and councils simply because of the status of local government as the "primary provider of interment services" in "regional areas."⁵

³ Sydney is defined as the Central, South, North, West, West-Central and South-West planning regions as delineated by the Greater Sydney Commission in the Greater Sydney Draft District Plan Map Atlas, November 2016, Interim Report, 20.

⁴ Interim Report, 21 (Table 4.1).

⁵ Ibid, 30.

If so, the recommendation fails to acknowledge how the primacy of local government as cemetery operators outside Sydney is due in part to the obstructive and protracted development approval application process that non-council cemetery operators face when attempting to acquire and develop new cemetery land outside Sydney.

We have acted in numerous matters wherein the development of a cemetery takes more than 8 years from the date of the initial purchase of the land to the start of the construction of the cemetery. For the most part, it appears as if councils are reluctant to approve the development of new cemeteries by non-council operators outside Sydney, regardless of whether the council has responsibility for maintenance.

The recommendation potentially fails to address the efforts of non-council cemetery operators to acquire new cemetery land outside Sydney, given the deterrent represented by the highly competitive Sydney market.

We disagree with the operation of the recommendation as a tool for promoting the monopoly councils have as cemetery operators in regional areas. By failing to address the circumstances around the regional cemetery data, this recommendation will only serve to exacerbate existing inefficiencies faced by private cemetery operators within the regional interment industry.

As a solution, we submit that Recommendation 3 may be improved upon by adding a gloss to the partnership between NSW government and local councils that will orient it towards identifying land for interment outside Sydney for equal opportunity use by both councils and non-local government operators.

3.2 Perpetual maintenance

Recommendation 6: There be a legal obligation on all cemetery operators to make adequate financial provision for perpetual maintenance of interment sites and the cemetery.

The Interim Report identifies how there is currently “no legal requirement for cemetery operators to set aside funds for the costs of perpetual maintenance.”⁶ This is despite the existence of a dedicated regulator (CCNSW) and guidance document (the *Cemeteries and Crematorium Operator Code of Practice 2018 – Interment rights and general services*, November 2018 (**Code of Practice**)).

The Code of Practice is a voluntary standard and provides high level guidance on perpetual maintenance (also known as legacy costs) in recommending that “operators are to set aside sufficient funds as part of their financial planning and operations.”⁷ In assessing the measures required by CCNSW in terms of perpetual maintenance, the Interim Report describes the current arrangements as “not adequate”⁸ and that cemetery operators have “a weak incentive to provide ongoing maintenance”⁹ when a cemetery reaches capacity and no longer generates revenue.

As such, the inadequacy of the current perpetual maintenance arrangements and the weak incentive for cemetery operators to account for legacy costs appears to be the result of a historical failure of the NSW government to effectively regulate the cemetery industry in relation to perpetual maintenance.

Despite this, we note that recommendation 6 has the effect of burdening cemetery operators with the future responsibility for this prior failure, and in turn increasing the cost of individual interment rights for consumers. In requiring all cemetery operators to make adequate financial provision for the perpetual maintenance of interment sites and

⁶ Ibid, 5.

⁷ Cemeteries and Crematorium NSW, *Cemeteries and crematorium operator code of practice 2018 – Interment rights and general services*, November 2018, section 8.5.

⁸ Interim Report, 46.

⁹ Ibid.

cemeteries, the implementation of recommendation 6 will result in cemetery operators necessarily factoring future perpetual maintenance liabilities into contemporary interment pricing. In fact, the Interim Report identifies how perpetual maintenance costs “need to be allocated to all interment rights holders in a cemetery.”¹⁰

Accordingly, recommendation 6 represents a decision to direct the consequences of historical regulatory failure onto present and future consumers. Such an arrangement is anathema to the central principle of the Review that interment pricing be affordable and equitable for all. Further, it incorrectly creates contemporary and future implications for stakeholders in the industry who are not directly responsible for the prior accrual of unfunded perpetual maintenance liabilities.

It is difficult to reconcile the failure of the NSW Government to adequately regulate the cemeteries industry in the past in respect of perpetual maintenance with the imposition by recommendation 6 of an obligation on cemetery operators to correct this failure. The unfunded liabilities represented by inadequate legacy costing should be attributed to the historical errors of the NSW Government. In support of this position, the Interim Report itself acknowledges that “if cemetery operators do not set aside funds for perpetual maintenance then the government may need to fund these obligations in the future.”¹¹

Although we acknowledge that a framework for adequate perpetual maintenance is essential, we submit that the process of correcting historical failures should be done by way of a government subsidy provided to cemetery operators, so that these prior legacy costs are not passed onto present and future consumers.

Such a subsidy will account for the failure of the NSW Government to adequately regulate perpetual maintenance in the past, and avoid the flow-on effect of recommendation 6 to consumers in violation of the pricing principles espoused by the Interim Report.

Recommendation 7: Cemetery operators that conduct more than 50 bodily interments in new perpetual interment sites per year at a cemetery must contribute to an independently managed perpetual maintenance reserve fund to provide for long-term cemetery maintenance.

Recommendation 8: The perpetual maintenance reserve fund for a cemetery must be independently managed by Treasury Corporation or an independent body approved by CCNSW.

In addressing the issue of legacy costs, the Interim Report suggests the establishment of perpetual maintenance funds. The Interim Report explores the management of perpetual reserve funds through two options:

- (a) Option 1: a cemetery operator establishes and manages their own perpetual maintenance fund;¹² or
- (b) Option 2: a cemetery operator contributes to a perpetual maintenance fund which is managed by an independent body, such as the Treasury Corporation or an independent body approved by CCNSW.¹³

The only disadvantage identified by the Interim Report in relation to Option 1 is the lack of separation between the funds set aside for perpetual maintenance, and the cemetery operator’s other funds; cemetery operators may potentially be able to use perpetual maintenance funds for purposes other than legacy costs.¹⁴

¹⁰ Ibid, 44.

¹¹ Ibid, 46.

¹² Ibid, 49.

¹³ Ibid, 50.

¹⁴ Ibid.

The Interim Report suggests an arrangement in Option 1 whereby CCNSW subjects the management of a perpetual maintenance fund to regular reporting, auditing and review.¹⁵ Despite this, the Interim Report ultimately recommends proceeding with Option 2, on the basis that the potential for the misuse of perpetual maintenance funds presents too great a risk.

However, we submit that the delegation of all perpetual maintenance fund management on behalf of cemetery operators to an independent body, such as the Treasury Corporation, is not only unsound, but presents greater difficulties than Option 1.

These difficulties are as follows:

- (a) Cemetery operators are varied in nature and many have complex legal, charitable and tax endorsement compliance requirements. Investment strategies must comply with an individual cemetery operator's entitlement to various tax endorsements, and such compliance will be difficult (if not impossible) to achieve by way of a single independent body across the spectrum of cemetery operators.
- (b) An independent body such as the Treasury Corporation is not required to compete at market with other fund managers against investment performance criteria. This may result in poor investment returns for the perpetual maintenance fund, effectively negating the purpose of establishing the fund in the first place.

Accordingly, the fitness for purpose of a perpetual maintenance fund is entirely dependant upon the cemetery operator's ability to choose an appropriate manager, structure and investment strategy. If perpetual maintenance fund management is delegated to a single independent body, this ability is removed and so too is the prima facie utility of the perpetual maintenance fund.

Evidence of the successful use of a privately selected investment manager is outlined in the Interim Report, with Rookwood General Cemeteries reporting that it has invested in "good quality financial instruments which can generate enough investment returns"¹⁶ to maintain its cemetery in perpetuity. The value of a specialised fund manager for private cemetery operators cannot be underestimated.

As outlined above, there is also evidence in the Interim Report in support of Option 1 that does not justify the leap from concerns about misuse of perpetual maintenance funds, to the delegation of perpetual care fund management to the Treasury Corporation or a similar independent body. In fact, we submit that Option 1 is not inconsistent with the requirement that the perpetual maintenance funds be distinct from the cemetery operator's other funds, in order to ensure perpetual maintenance funds are not applied to improper, non-perpetual maintenance purposes.

The Interim Report suggests a number of different arrangements in its discussion of Option 2. However, we submit that these are also perfectly suited for use as safeguards against the misuse of funds (the primary concern in relation to the establishment of a perpetual maintenance fund by a cemetery operator directly). These arrangements are as follows:¹⁷

- (a) Implementation of obligatory perpetual maintenance fund contributions under the *Cemeteries and Crematoria Act 2013* (NSW), achievable by either:
 - (i) Developing a regulation to establish an interment industry scheme that requires an operator of a cemetery to comply with the provisions a code of practice developed and approved by CCNSW;

¹⁵ Ibid.

¹⁶ Ibid, 47.

¹⁷ Ibid, 52.

- (ii) Developing a regulation to establish an interment industry scheme that requires an operator of a cemetery to ensure adequate provision is made for perpetual care of interment sites and the cemetery; or
 - (iii) Developing a regulation requiring a licence to provide interment services, with a condition of a licence being that a cemetery operator needs to contribute to a perpetual maintenance fund.
- (b) The development of guidelines by CCNSW on the permitted uses of perpetual maintenance funds. In particular, the Interim Report highlights the utility in providing guidance on the type of costs for which the application of dedicated perpetual maintenance funds is acceptable.¹⁸

We submit that all of the above arrangements will fulfil the dual requirement that cemetery operators both make provision for legacy costs and do so in a way that is transparent, responsible, and free of the risks of misapplication, without delegating the management of a perpetual maintenance fund to the Treasury Corporation.

We submit that if a cemetery operator is subject to a form of regulation that demands the proper use of its perpetual maintenance fund, and is additionally provided with comprehensive guidance in relation to the fund and its regulation, the dangers of perpetual maintenance funds being allocated to non-legacy purposes is minimised.

Accordingly, the fact that the Interim Report presents these arrangements, and the ability they carry to address the concerns associated with Option 1, makes the decision to recommend the appointment of an independent body, such as the Treasury Corporation, as the sole perpetual maintenance fund manager puzzling.

Further, regulation and guidance will also address the issue identified in the Interim Report in relation to those providers of perpetual maintenance services, once a cemetery closes, that are not the original cemetery operators.¹⁹ The permissions or approvals that would be required for a maintenance provider to access the perpetual maintenance funds set aside earlier by a cemetery operator into a self-established fund are likely to be substantially similar to those permissions or approvals that would be required for that maintenance provider to access the funds given to an independent fund manager, such as the Treasury Corporation.

Accordingly, the potential for maintenance providers that are different to the original cemetery operators should not be a determining factor in the decision to use Treasury Corporation as a central perpetual maintenance fund manager.

Recommendation 9: CCNSW to develop Guidelines on when and how a cemetery operator can use perpetual maintenance funds for a cemetery.

As discussed above, we welcome the recommendation that CCNSW develop Guidelines on when and how a cemetery operator can use perpetual maintenance funds for a cemetery.

In particular, we submit that such guidelines have the potential to negate the need for an independent perpetual fund manager such as Treasury Corporation, in that they may outline:

- (a) The degree of separation required between a cemetery operator and the maintenance fund;
- (b) The permitted uses of perpetual maintenance funds; and
- (c) How maintenance providers may access perpetual maintenance funds set aside by cemetery operators.

¹⁸ Ibid.

¹⁹ Ibid, 51.

In order to give effect to these purposes, we submit that existing cemetery operators should be invited to provide input on the development of the guidelines by CCNSW.

In relation to (b) above, we submit that the combined effect of requiring cemetery operators to account for a historical perpetual maintenance fund deficit, plus a future prohibition on the use of perpetual maintenance funds for the purchase of new cemetery land, will effectively remove a cemetery operator's financial ability to acquire new cemetery land altogether. We respectfully submit that IPART further consider the suggestion on page 52 of the Interim Report that the use of perpetual maintenance funds to purchase new cemetery land is improper, given the economic realities of the sector.

3.3 Publication of pricing

Recommendation 11: To make it easier for consumers to compare and understand prices for bodily interment services, cemetery operators be required by regulation to publish prices for all bodily interment services on a consistent basis.

Recommendation 12: Within 12 months CCNSW to develop a central website to enable consumers to compare prices for interment services in one place.

We agree with the Interim Report's recommendation that interment prices be published consistently by all cemetery operators, as it will in principle both simplify the interment process for consumers and make that process more transparent. However, price publication must be carefully executed in order to ensure that these purposes are, in fact, effectively served.

There are a variety of service components that make up the process of interment. As outlined in the Interim Report, the individual services performed by cemetery operators generally include:²¹

- (a) The allocation of the interment right, which includes:
 - (i) The site;
 - (ii) Maintenance; and
 - (iii) End of tenure costs;
- (b) The interment itself, which is comprised of:
 - (i) Excavation;
 - (ii) Order for interment,
 - (iii) Burial or placement;
 - (iv) Any additional costs due to cultural or religious requirements;²² and
- (c) The memorial (plaque, monument, headstone, garden or other item).

We note that the Interim Report recommends that itemised prices for each service component of the bodily interment process above (i.e. excavation, order, and burial) be published by cemetery operators, despite the fact that consumers are not actually able to decide whether a particular service component is performed.

We submit that the publication of the price of certain service components, such as "excavation," will be superfluous for consumers by reason of their unavoidability, and for this reason should not be recommended.

Alternatively, if it is necessary to publish the itemised prices of those service components that are compulsory in the interment process and, thus irrevocably

²¹ Ibid, 64.

²² Ibid, 66.

included in the interment price, then we submit that the status of these service components as compulsory be clarified for the consumer.

If the publication of all service component prices does not carry this clarification, it may lead to the impression in the consumer that those service components are optional and, thus, the publication of interment prices will actively work against the pricing principles of simplicity and transparency.

We also submit that CCNSW should consult with cemetery operators on the different names and types of service components that are included in their interment prices, so that a common terminology may be developed that is both easily adopted by cemetery operators to their existing services, and appropriately comparable for consumers. Effective comparability is at the core of recommendations 11 and 12 and should be at the forefront of the development of the price publication and website.

Recommendation 13: In setting interment fees and charges, all cemetery operators should include future maintenance costs of their cemeteries.

As outlined in Section 3.2 above, we disagree with the imposition of an obligation on cemetery operators to increase interment prices in response to the NSW Government's historical failure to regulate perpetual maintenance. The absence of those perpetual maintenance funds that should have been generated in preceding years is not the responsibility of the current or future consumer, and any suggestion that current interment prices should be increased to rapidly generate these historical funds is unjustified.

We agree with recommendation 13 on the basis that future maintenance costs may appropriately contribute to the setting of current interment prices, but only to the extent that those costs relate to the maintenance of interments being purchased by contemporary and future consumers, not existing or past interments.

4 Conclusion

In summary, the recommendations in relation to land acquisition, perpetual maintenance, and publication of pricing have nuanced implications for the interment industry and should be developed further prior to implementation.

I respectfully urge IPART to consider the issues and recommendations raised in this submission when producing its final report.

If you have any questions or require further information regarding our submissions, please do not hesitate to contact Vera Visevic on [REDACTED] or vvisevic@millsoakley.com.au.

Yours sincerely



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