



New South Wales

Cemeteries and Crematoria Bill 2013

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows:

- (a) to recognise the right of all individuals to a dignified interment and treatment of their remains with dignity and respect,
- (b) to ensure that the interment practices and beliefs of all religious and cultural groups are respected so that none is disadvantaged and adequate and proper provision is made for all,
- (c) to ensure that sufficient land is acquired and allocated so that current and future generations have equitable access to interment services,
- (d) to provide for the operation of a consistent and coherent regime for the governance and regulation of cemeteries and crematoria,
- (e) to ensure that the operators of cemeteries and crematoria demonstrate satisfactory levels of accountability, transparency and integrity,
- (f) to ensure that cemeteries and crematoria on Crown land are managed in accordance with the principles of Crown land management specified in section 11 of the *Crown Lands Act 1989*.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 states the objects of the proposed Act.

Clause 4 provides that certain words or expressions are defined in the Dictionary to the proposed Act or have the same meaning as in the *Crown Lands Act 1989*. It also states that references in the proposed Act to a *cemetery* in general extend to include references to a crematorium and to part of a cemetery or crematorium and references to a *cemetery operator* include references to a crematorium operator or an operator of part of a cemetery or crematorium.

Clause 5 describes the relationship between the proposed Act and certain other legislation.

Part 2 Administration

Division 1 Constitution and management of Cemeteries Agency

Clauses 6–11 constitute Cemeteries and Crematoria NSW (the *Cemeteries Agency*) as a body corporate and deal with its management, control and staff. All decisions relating to the functions of the Cemeteries Agency are to be made by or under the authority of the Board of the Cemeteries Agency (the *Board*). The Chief Executive Officer of the Cemeteries Agency is responsible for the day-to-day management of the affairs of the Cemeteries Agency subject to the policies and directions of the Board.

Division 2 Functions of Cemeteries Agency

Subdivision 1 Principal functions

Clauses 12 and 13 set out the principal functions of the Cemeteries Agency and make it clear that the Cemeteries Agency may do all acts necessary or expedient for the exercise of its functions.

Subdivision 2 Ancillary functions

Clauses 14 and 15 set out some ancillary functions of the Cemeteries Agency. These include a reserve power to acquire land and transfer it to the operator of a Crown cemetery trust or other cemetery operator in specified circumstances if the Cemeteries Agency considers it is necessary to do so to ensure equitable access to interment services by all religious and cultural groups (clause 14).

Division 3 The Board

Subdivision 1 Constitution of Board

Clause 16 provides for the constitution of the Board and the voting rights of its members.

Subdivision 2 Duties and liabilities of Board members

Clauses 17–21 contain provisions requiring the honest and diligent conduct of, and the disclosure of personal interests by, voting members of the Board. A person who contravenes such a provision is liable to a civil penalty.

Division 4 Finance

Clauses 22–25 contain provisions relating to financial matters, including the establishment of a Cemeteries Agency Fund, the amounts to be paid into and out of that Fund and investment powers in relation to the Fund. Clause 24 enables the Cemeteries Agency to impose general and special levies on operators of cemeteries, or classes of cemetery, prescribed by the regulations. General levies are contributions towards the cost of the administration of the proposed Act to the extent that it relates to cemeteries. Special levies may be imposed as a contribution towards the cost of

acquiring land under clause 14. Contributions by way of a special levy will not be able to exceed an amount in total to be prescribed by the regulations.

Part 3 Regulation of interment industry

Division 1 Preliminary

Clause 26 defines *interment industry* to include the operators of cemeteries, funeral directors, funeral contribution funds and other persons, or persons of a class, prescribed by the regulations.

Clause 27 requires the Cemeteries Agency to keep a register of cemeteries and crematoria. An operator of a cemetery must not fail to provide the Cemeteries Agency with certain information prescribed as information that must be included in the register or fail to notify material changes in that information. An operator who contravenes this provision is liable to a civil penalty.

Division 2 Codes of practice

Clauses 28–30 provide for the development and approval of codes of practice to provide guidelines regarding activities of participants in the interment industry or sectors of the industry. The Cemeteries Agency may develop a code of practice on its own initiative or in collaboration with interment industry participants. Compliance with a code of practice will not be mandatory unless made so by a regulation establishing an interment industry scheme under proposed Division 3.

Division 3 Interment industry schemes

Clauses 31 and 32 provide for the establishment by the regulations of an interment industry scheme following consultation with participants in the interment industry that will be affected. A scheme may, for example, require compliance with the whole or part of a code of practice, require the operators of cemeteries to ensure adequate provision is made for perpetual care of interment sites or require the licensing of activities, persons or businesses providing interment services. A person who fails to comply with a requirement of a scheme that applies to the person is liable to a civil penalty.

Division 4 Improvement notices

Clauses 33–35 enable the Cemeteries Agency to issue an improvement notice requiring the operator of a cemetery to end a contravention of a provision of an interment industry scheme or take action to remedy the consequences of the contravention within a stated time. An operator who contravenes an improvement notice by failing to end a contravention of a provision of an interment industry scheme is liable to a civil penalty. If the operator fails to remedy the consequences, the Cemeteries Agency may take action to do so and the cost of that action will be payable by the operator.

Division 5 Short term orders

Clauses 36–38 enable the Cemeteries Agency to order operators of cemeteries to take specified action or refrain from taking specified action if it considers the making of the order to be reasonably necessary in the public interest to prevent or lessen a serious threat or risk to the achievement of an object of the proposed Act pending the making of a regulation under proposed section 31 establishing an interment industry scheme that makes provision for a mandatory code of practice requirement. An operator who contravenes a short term order is liable to a civil penalty.

Division 6 Enforceable undertakings

Clauses 39 and 40 enable the Cemeteries Agency to accept undertakings to take action or refrain from taking action from a person who the Cemeteries Agency considers has contravened the proposed Act, the regulations or a provision of an interment industry scheme. An undertaking will be able to be enforced (including by the making of orders relating to compensation) by the Local Court or any other court or tribunal prescribed by the regulations.

Division 7 Management of cemetery operators

Clauses 41–43 enable the Cemeteries Agency to require cemetery operators to report to the Cemeteries Agency about the operators' performance in managing cemeteries and to keep certain records. An operator who fails to comply with the reporting and record requirements is liable to a civil penalty.

Part 4 Interment rights and cemetery renewal

At present, provisions of the *Crown Lands (General Reserves) By-law 2006* (the *CL By-law*) provide for a burial licence scheme for Crown cemeteries for which a reserve trust has been established under the *Crown Lands Act 1989*. A burial licence entitles its holder to a right of burial with respect to a particular place and, under the common law, a right to remain interred until dissolution arises on burial.

The proposed Part incorporates the current provisions with necessary adaptations to provide for one form of authority (an *interment right*) giving both a right to burial in a particular place and a further right to remain interred undisturbed for all cemeteries. The duration of that right will depend on whether the interment right is a perpetual interment right or a renewable interment right within the meaning of clause 47.

Division 1 Preliminary

Clause 44 defines certain terms for the purposes of the proposed Part, including *interment right*.

Division 2 Interment rights

Subdivision 1 Preliminary

Clause 45 provides for the application of the proposed Division. It makes it clear that burial licences granted under the *Crown Lands Act 1989* and other rights, licences or entitlements that are similar in nature to interment rights given before the commencement of the proposed section under the proposed Division are preserved unless otherwise provided.

Subdivision 2 Interment rights generally

Clause 46 states the nature of an interment right given under the proposed Division.

An interment right requires the cemetery operator:

- (a) to permit the interment of the remains of the person to whom it relates at the site in a cemetery identified in, or in accordance with, the interment right, and
- (b) to permit any such interment in accordance with the cultural or religious practice applicable to the part of the cemetery in which the interment site is located at the time the interment right is granted, and
- (c) to permit a memorial to the deceased person to be erected at the site with the approval of the cemetery operator, and
- (d) to leave the remains undisturbed in perpetuity (or, in the case of a renewable interment right, until such time as the remains may be disturbed or removed in accordance with the proposed Act) unless disturbance or removal at an earlier time is requested or authorised by the holder of the interment right, and
- (e) to leave any memorial to the deceased person lawfully erected at that site, with the permission of the cemetery operator, undisturbed (provided the interment right remains in force and the memorial is kept in good repair) until such time as the memorial may be disturbed in accordance with the proposed Act unless disturbance at an earlier time is requested or authorised by the holder of the interment right.

A cemetery operator who disturbs remains or a memorial in contravention of the provisions described in paragraph (d) and (e) is liable to a civil penalty.

Subject to the regulations, a cemetery operator must also ensure that any remains that are disturbed or removed are dealt with in accordance with any cultural or religious practices applicable to the remains.

Clauses 47 and 48 describe the types and duration of interment rights. An interment right may be granted in perpetuity (a *perpetual interment right*) or for the period an interment right granted under proposed section 54 remains in force (a *renewable interment right*).

Clauses 49–51 provide for the bequeathal of interment rights, the effect of intestacy of the holder of such a right and for the devolution of the right on the death of a joint holder. They essentially mirror clauses 31–33 of the CL By-law with necessary modifications for the wider application of the provisions explained above.

Clause 49 requires the executor of the estate of the holder of an interment right who has bequeathed the right to notify the cemetery operator of the death of the holder. This is to enable the operator to more easily comply with the requirements of the proposed Act concerning the keeping of a cemetery operator's register (clause 63).

Clauses 52 and 53 provide for the revocation of unexercised perpetual interment rights and payment of compensation on revocation. They are similar to clauses 34 and 35 of the CL By-law.

Subdivision 3 Renewable interment rights

Clause 54 provides for the grant and renewal of renewable interment rights. A renewable interment right is granted for an initial term of up to 99 years for cremated remains and 25 years for human remains other than cremated remains. The right may (and in specified cases must) be renewed by the operator on application by the holder for further terms of at least 5 years so long as the aggregate of the initial and any further terms does not exceed 99 years.

Clause 55 provides for the re-use of an interment site 2 years after the expiration of a renewable interment right. An interment site can only be re-used after the notice requirements set out in the clause have been complied with and the necessary authorisations obtained. Before an interment site is re-used, the cemetery operator must ensure that any cremated remains are returned to the holder of the right or scattered in the cemetery and that any bodily remains of a deceased person found at the site are placed in an ossuary box and re-interred at a greater depth or placed in an ossuary house or similar place. An interment site cannot be re-used if this requirement cannot be complied with because of the insufficiently decomposed state of such bodily remains or if certain specified memorials are erected on the site. In any case, an interment site cannot be reused until human remains of a deceased person (other than cremated remains) that are interred in the site have been interred for at least 10 years (or such other period as may be prescribed by the regulations). A cemetery operator who contravenes certain of these requirements is liable to a civil penalty.

Subdivision 4 Grant and transfer of interment rights generally

Clauses 56–62 contain provisions relating to the grant and transfer of interment rights. The provisions relating to transfer largely mirror (with necessary modifications) clauses 28–30 of the CL By-law.

Subdivision 5 Miscellaneous

Clause 63 requires the operator of a cemetery to maintain a register containing particulars relating to the grant of interment rights and other specified events. Operators will also be required to include particulars relating to burials and cremations. This requirement will replace the requirement to keep registers of these matters under the *Public Health Regulation 2012*. An operator who contravenes these requirements is liable to a civil penalty.

Clauses 64–68 contain provisions concerning the keeping of registers and documents and the exhumation and interment of bodies. An operator who contravenes certain such provisions under proposed section 64 is liable to a civil penalty.

Clause 69 requires a cemetery operator to establish a heritage advisory committee if renewable interment rights are offered.

Division 3 Cemetery renewal

Clauses 70–75 largely mirror the provisions of clauses 34A–34F of the CL By-law with necessary modifications to enable such a scheme to be implemented by the operator of any cemetery (not only for a reserve dedicated or reserved for cemetery purposes under the *Crown Lands Act 1989*) with the approval of the Cemeteries Agency. Approval of a renewal scheme for a cemetery enables the re-development of existing parts of the cemetery to accommodate new burial sites and locations for memorials.

Division 4 Offence

Clause 76 creates an offence concerning conduct in cemeteries.

Part 5 Operation of Crown cemeteries and crematoria

Division 1 Preliminary

Clause 77 defines certain terms and expressions used in the proposed Part.

Clause 78 enables the Cemeteries Agency to exempt a Crown cemetery operator, class of Crown cemetery operators, trust member or class of trust members from the operation of provisions of the proposed Part.

Division 2 Cemetery trust operators

Subdivision 1 Appointment of trust operators

Clauses 79–86 mirror (with necessary modifications) section 92 (6)–(6B) and related provisions of the *Crown Lands Act 1989* so that the affairs of reserve trusts for cemetery and crematorium, and related, purposes established after the commencement of proposed section 79 will be managed by trust members appointed under the proposed Act instead of that Act.

Subdivision 2 Conduct of trust members

Clauses 87–91, 93 and 94 contain provisions requiring the honest and diligent conduct of, and the disclosure of personal interests by, trust members. A person who contravenes such a provision is liable to a civil penalty. **Clause 92** requires a Crown cemetery operator to prepare a code of conduct to be complied with by trust members. This requirement and the provisions of such a code will apply to both trust members appointed under the proposed Act and those appointed under the *Crown Lands Act 1989* before the commencement of the new provisions.

Clause 95 protects certain persons from personal liability for acts or omissions done in good faith in the course of managing the affairs of a Crown cemetery trust.

Subdivision 3 Strategic plans

Clauses 96–98 require a Crown cemetery operator to prepare a strategic plan identifying the main priorities for the future of a Crown cemetery in the period to which the plan relates in accordance with guidelines made by the Cemeteries Agency. This requirement will apply to both Crown cemetery operators appointed under the proposed Act and those appointed under the *Crown Lands Act 1989* before the commencement of the new provisions.

Subdivision 4 Plans of management

Clauses 99–104 require a Crown cemetery operator to prepare a draft plan of management in accordance with guidelines made by the Cemeteries Agency and to submit it to the Cemeteries Agency for adoption. If a plan of management is adopted, the operator must carry out and give effect to it and no operations may be undertaken in relation to the cemetery except in accordance with the plan. This requirement will apply to both Crown cemetery operators appointed under the proposed Act and those appointed under the *Crown Lands Act 1989* before the commencement of the new provisions.

Subdivision 5 Financial management, audits and reports

Clauses 105–108 contain provisions relating to financial and audit matters such as annual reports. The requirements will apply to both Crown cemetery operators appointed under the proposed Act and those appointed under the *Crown Lands Act 1989* before the commencement of the new provisions. The provision relating to annual reports will only apply in respect of a financial year commencing on or after 1 July 2014 (see clause 8 of Schedule 3).

A Crown cemetery operator who fails to comply with a direction given by the Cemetery Agency under proposed section 107 (1) concerning provision of information relating to a financial report or operations is liable to a civil penalty.

Subdivision 6 Committees

Clauses 109–111 require a trust board to establish a finance committee, an audit and risk committee and a community advisory committee in accordance with guidelines made by the Cemeteries Agency and contain provisions with respect to the membership and procedure of such committees.

Subdivision 7 Miscellaneous

Clauses 112 and 113 contain provisions with respect to the powers exercisable by Crown cemetery operators, including the powers to fix fees and charges.

Part 6 Legal proceedings and other matters

Division 1 Proceedings for offences

Clauses 114–117 are provisions with respect to proceedings for offences and the issue of penalty notices.

Division 2 Civil penalty provisions

Clauses 118–128 are provisions with respect to proceedings in respect of civil penalty provisions.

Division 3 Civil infringement notices

Clauses 129 and 130 are provisions with respect to proceedings for the issue of civil infringement notices in respect of civil penalty provisions.

Part 7 Investigation and enforcement powers

Division 1 Appointment of authorised officers

Clauses 131–133 provide for the appointment, scope of authority and identification of authorised officers.

Division 2 Powers of authorised officers

Clauses 134–142 deal with the powers of authorised officers.

Division 3 Offences in relation to authorised officers

Clauses 143 and 144 make it an offence to obstruct an authorised officer in the exercise of his or her functions under the proposed Act or to impersonate an authorised officer.

Part 8 Miscellaneous

Clause 145 provides for the service of documents under the proposed Act.

Clause 146 provides for the exchange of information between the Cemeteries Agency and specified government agencies.

Clause 147 protects certain persons from personal liability for acts or omissions done in good faith.

Clause 148 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 149 provides for the review of the proposed Act in 5 years.

Schedule 1 Members and procedure of Board

Schedule 1 contains provisions dealing with the constitution and procedure of the Board.

Schedule 2 Members and procedure of trust boards

Schedule 2 contains provisions dealing with the constitution and procedure of trust boards. These substantially mirror Schedules 3 and 5 of the *Crown Lands Act 1989*.

Schedule 3 Savings, transitional and other provisions

Schedule 3 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 4 Conversion of cemeteries

Schedule 4 transfers the provisions of the *Conversion of Cemeteries Act 1974* to the proposed Act so as to enable its repeal and the consolidation of the provisions in the proposed Act.

Schedule 5 Transferred and other provisions relating to certain cemeteries and crematoria

Schedule 5 transfers the provisions of a number of Acts and subordinate instruments relating to certain cemeteries and crematoria so as to enable their repeal and the consolidation of the provisions in one Act. It also enables regulations to be made modifying the application of those provisions for the purposes of the proposed Act.

Schedule 6 Amendment of Acts and subordinate instruments

Schedule 6 makes consequential amendments to the Acts and subordinate instruments specified in the Schedule. It also includes amendments to section 8 of the *Summary Offences Act 1988* to extend the application of that section to conduct related to an interment site in a cemetery.

Dictionary

The Dictionary to the proposed Act defines certain terms and expressions used in the proposed Act.