Funeral Funds Amendment Bill.

Second Reading

Ms REBA MEAGHER (Cabramatta—Minister for Fair Trading, and Minister Assisting the Minister for Commerce) [11.36 p.m.]: I move:

That this bill be now read a second time.

This bill introduces reforms to the prudential management of funeral funds in New South Wales. It will further strengthen the provisions protecting pre-payments made by consumers for funeral services, which may be made many years in advance of delivery. Death is not something we like to talk about. We generally put it out of our minds as it can seem too maudlin to speculate about our own funeral arrangements. However, it can be distressing for older people to know that there is no provision made for their funeral and that the cost may be an impost upon the limited resources of the relatives that they leave behind. Historically, pre-paid funeral products have met a need in the community for those who prefer to be certain that, on their deaths, their families will not bear the cost of providing them with a dignified funeral service. Prearranging our funeral can also reduce the number of decisions that our loved ones have to make after we are gone, when they are grieving and probably disinclined to shop around to compare prices.

Pre-arranging and pre-paying for a funeral can also make good financial sense. It can lock in the cost of a funeral service at today's prices, regardless of when it is delivered , and it can reduce the possibility of loved ones committing themselves to more expensive funerals than they can afford. It has also been used as a way to reduce assets for the purposes of calculating the pension. However, prior to the introduction of the Funeral Funds Act 1979, some practices in the funeral industry were not necessarily in the best interests of consumers. Many bereaved relatives were finding that the money their loved one had contributed to a funeral fund did not fully meet the cost of the funeral service as they had been promised, or that they were being pressured into paying for a better class of funeral service than their loved one had paid for. Some funeral directors were also using the contributions in the running of their own business and hence the funds were not being preserved for when the client who had made the pre-payments required their delivery.

These sorts of practices led to the 1977 Prices Commission inquiry into the operation of the funeral industry, which found that many businesses failed to act in the best interests of their customers and that there were grounds for concern about the financial viability of some of the funds. The Funeral Funds Act 1979 was therefore introduced to establish standards for the conduct of funeral funds and to ensure that money paid in advance for the provision of a funeral service was protected. It also introduced provisions to protect people from high-pressure sales tactics to purchase a more elaborate service than had already been paid for and to ensure that the funeral service was delivered as ordered. The Act makes the distinction between two types of funeral funds—funeral contribution funds and prearranged funds. In a contributory scheme, a person makes small payments on a regular basis until their death. These funds either contribute towards a funeral service or provide a cash benefit towards the cost of the service. The funeral service may or may not be carried out by a funeral director associated with the fund.

A prearranged fund on the other hand allows many of the expenses and arrangements to be made in advance and involves the consumer paying for the cost of a funeral service in a lump sum or in large instalments. The consumer pays for the services at today's prices and in return is guaranteed the delivery of that funeral service, whenever it may be needed, at no extra cost. By creating the legislative framework in which these funds can operate, the Government is not endorsing the use of funeral funds. However, by placing requirements on how funds may be managed, it greatly increases the protection available to those who wish to make arrangements for their funeral expenses.

Consumers would typically approach a funeral director to discuss the purchase of prearranged funerals. Funeral directors remain the face of the industry, and many people plan a pre-paid funeral with the director they hope will deliver the service. While the Act prevents a funeral director from taking the money paid in advance by the consumer for a funeral service and investing it in their own business, funeral directors are still able to arrange the purchase of a pre-paid funeral on a consumer's behalf. However, any money paid by the consumer must be invested with a funeral fund that is registered with the Office of Fair Trading.

It should be noted that there are a range of funeral benefit products on the market, such as funeral bonds and funeral insurance, which do not come under the Funeral Funds Act. Consumers would usually purchase these products directly from the company or insurer. These arrangements typically provide for a cash payment on death and the consumer would not generally have the opportunity to specify how they would like their funeral carried out. Consumer protection for these sorts of products is provided under other legislation, such as the Commonwealth's Life Insurance Act. Any offences in relation to false and misleading conduct can also be pursued under the Fair Trading Act.

Over $160 million is currently invested in funeral funds in New South Wales. It is essential that people can feel

confident that these pre-payments are secure until such time as they are needed—often several decades later. The need for continuing consumer protection in the funeral fund industry was recognised in a review of the Funeral Funds Act, which commenced in 2000, and was undertaken in accordance with the requirements of the National Competition Policy agenda. The final report on the review was released in April 2002. The review concluded that the funeral fund industry continues to require close prudential scrutiny. The review also identified legislative duplication between New South Wales and Commonwealth Government regulatory regimes. While the review recommended that prudential oversight in these cases would be more appropriately undertaken at the Commonwealth level, the intention was for these funds to remain subject to the key consumer protection measures of the Funeral Funds Act.

The review also identified a number of provisions in the Act that impose unnecessary costs and restrictions on business, and accordingly recommended them for repeal. Most of these are outdated provisions related to how a funeral fund should be constituted, managed or named. The review's recommendations also included a requirement for previously exempted funds to seek registration under the Act, subject to appropriate transitional arrangements. The implementation of the review's recommendations was delayed due to uncertainty about the applicability of the Commonwealth's financial services reform legislation to funeral funds operating in New South Wales. However, the Commonwealth introduced a new regulation in March 2003 that will reduce ambiguity in relation to the coverage of funeral benefits.

Certain reforms to update and improve the regulation of the funeral fund industry are now being proposed for introduction. These reforms are based on the recommendations of the National Competition Policy Review of the Act, as well as some new issues that have come to the Government's attention since the completion of the review. The majority of new issues relate to the refinement of the powers of the Commissioner for Fair Trading, or are administrative in nature, and will not have a significant impact on the operation of funds.

I wish to turn now to the specific detail of the bill. At the outset I wish to stress that the bill does not propose to regulate the funeral industry generally. The bill is limited to the operation of funeral funds. The bill will, for the first time, introduce annual reporting to members of contributory funds, which will reduce uncertainty for members and their families about the precise nature of an entitlement to be paid. The Office of Fair Trading has received advice that suggests that a member may contribute regularly all their life only for their family to discover that their entitlement may be as little as a few hundred dollars or a small "discount" on a funeral.

It has also been revealed that it is not uncommon for only one set of paperwork to ever be provided to the consumer, at the start of the contract. It is conceivable that it may be over 50 years between the time the contract is entered into and is delivered. During this time the fund may have changed its name or merged with another business. Regular reporting to consumers will ensure that members are aware of any changes in fund management, even if it is just through the change in the name of the fund on the letterhead of any report, making it easier for members to contact the fund with any questions about their entitlement.

It is acknowledged that producing such statements on an annual basis creates an additional cost for industry, but this is considered to be outweighed by the benefits to consumers. However, in recognition of the potential costs as well as other difficulties contributory funds may encounter in implementing this requirement, the bill establishes the need for contributory funds to report annually to members, but provides that the level of detail to be included in the report is to be prescribed by regulation.

It is not proposed to extend the reporting provision to pre-arranged funds because there is no scope for the consumer's entitlement to vary with this type of fund and the member is assured of the delivery of a funeral service at no extra cost, even if it is required 20 years down the track. There are various classes of exemptions permissible under the legislation. The review of the Act found that the various classes of exemptions created market inequalities, by providing an advantage to those funds that are not subject to the prudential and other regulatory requirements of the Act. It also means that consumers have more limited forms of redress if they have a problem with an exempt fund. While it is acknowledged that some exemptions were originally granted to avoid legislative duplication, the review concluded that exemptions should not be provided on this basis alone and that all funds should be subject to registration and its associated accountabilities. However, the argument about avoiding regulatory duplication is acknowledged and this is dealt with separately in the bill.

The Government will ensure that the removal of the exemption provisions will not have an adverse impact on the industry. A number of funds are no longer accepting new business and may have only a few contracts remaining. The bill therefore proposes transitional arrangements that will enable the Office of Fair Trading to consult with each affected fund about the nature of their current arrangements with members, the number of contracts remaining and amount of funds held.

The office will then be able to determine the specific provisions of the legislation to which each fund will be subject. For example, the intention is not to impose unnecessary financial hardship on a fund that may only have a few members remaining, by making them subject to the requirement for actuarial assessment every three years. These types of funds may only be required to report annually to the office about the number of fund members remaining and may continue to be subject to a restriction on accepting new business. However, it is the intention to ensure that all funds operate according to suitable standards and that there is some consistency in the way the funds report to the office and to their members.

The bill provides that funds will be required to apply to the Office of Fair Trading for registration within six months of the commencement of the relevant legislative provisions. Not to do so will be an offence under the Act. The office will then have up to six months to work with each of the affected funds to determine whether full or conditional registration is appropriate. If funds cannot achieve full or conditional registration within a timeframe specified by the commissioner, they will be required to transfer their remaining contracts to a registered fund under the Act. Affected funds will have a right of appeal in relation to conditions of registration which may be imposed or if the Commissioner refuses to exempt a fund from complying with certain provisions of the Act or Regulations.

The bill also proposes the introduction of a cooling-off period for pre-paid contracts, which will provide greater protection for vulnerable consumers, particularly the elderly, who may be more susceptible to pressure to buy a pre-paid funeral service. While the majority of the funeral industry operate in an ethical and sensitive manner, the Office of Fair Trading has received information that agents of certain funeral companies may be approaching grieving relatives at the cemetery when they are visiting the resting place of their loved one and pressuring them into signing up for a pre-paid funeral.

The Carr Government will not tolerate individuals taking advantage of vulnerable consumers or using high-pressure tactics to sell pre-paid funeral services to elderly or grieving persons. The cooling-off period will therefore give consumers an opportunity to get out of the contract if they find themselves in this position or if they change their mind within a certain period, which will be established in consultation with industry. The cooling-off period will complement the existing provisions in the legislation which protect grieving families from being charged more, and from high pressure sales tactics to purchase a more elaborate service than has already been paid for under pre-arranged contracts.

As previously mentioned, the review identified legislative duplication between New South Wales Government and Commonwealth Government regulatory regimes. For example, friendly societies that operate funeral funds in New South Wales are also subject to a stringent regulatory regime under the Life Insurance Act and as such are under prudential supervision by the Australian Prudential Regulation Authority. Submissions to the review indicated that this duplication has created administrative difficulties for funds by requiring them to report at different times and to provide different types of financial information at those times. The complexities of complying with different legislative requirements also appear to have added to the administration costs of affected funds, without a subsequent increase in consumer protection.

The review considered that the provisions of the Life Insurance Act and other prudential legislation at the Commonwealth level provide a standard of prudential supervision comparable to or higher than the Funeral Funds Act. The bill therefore provides that where a fund can demonstrate compliance with other appropriate prudential regulation, the fund may be exempted from complying with certain prudential requirements of the Funeral Funds Act. However, in these cases the intention is for the funds to continue to be subject to the key consumer protection measures of the Act. For instance, families would still be able to pursue complaints over non-delivery or unsatisfactory delivery of the service in relation to the terms of the contract or non-payment of the moneys owing to the estate by a fund.

Earlier I referred to the fact that the review of the Funeral Funds Act recommended the removal of certain outdated provisions related to how funeral funds should be constituted, managed or named. I will now provide an overview of how these provisions are addressed in the bill. The bill proposes the removal of the maximum number of fund directors permitted to manage a contributory funeral fund. Currently, the Act provides that funeral contribution funds may have not less than three and no more than seven directors. In contrast, a corporation or at least three persons may be registered as a prearranged fund, but no maximum is prescribed.

While submissions on these provisions generally suggested that the restrictions on company management structure have not impacted upon fund management and could be retained, it is not apparent why it is necessary to continue requiring contributory funeral funds to have only seven directors. It is felt that removing this limit and allowing more fund directors to become involved in the management of a contributory fund may actually enhance accountability and stability within a fund. In relation to the minimum number of requirements, an argument has been made that funeral funds do not require different structures than those provided for under Corporations Law, which currently allows for a company to be run by one member, who would also be the sole director. However, it is not intended to address the minimum number of requirements for funeral funds in this bill.

Further consultation needs to be undertaken to determine whether the Act should continue to impose a restriction of three directors or persons for the management of funeral funds, in line with the public company model. The issue of whether this requirement should also be extended to corporations that register as prearranged funds also needs to be explored. If this is to be the case, the potential impact of such a provision on existing registered funds needs to be established.

Another feature of the bill is the proposed removal of the cap on the maximum level of benefit that can be made to a consumer under a contributory fund. It is not clear why consumers should be prevented from paying larger amounts into a contributory fund. The original cap limited the maximum amount payable to a consumer to $1,000. This was later increased to $5,000 and is currently capped at $20,000. While this exceeds what the average person may currently spend on a funeral, the need for such a control is not evident. The removal of the cap will reduce the need for consumers to transact with more than one fund if they wish to obtain funeral services in excess of $20,000.

The bill also proposes the removal of the requirement for prearranged and contributory funds to open and maintain deposit accounts with a New South Wales bank, building society or credit union. The requirement for the account to be based in New South Wales is outdated and is a hindrance to funds that may have their operations based in another State. The bill therefore proposes that this requirement be replaced by one requiring that the account be with an authorised deposit-taking institution.

The bill proposes the removal of the cap on management expenses that both prearranged and contributory funds are permitted to pay themselves as fund managers. Currently this is set at 2 per cent of accrued income on investments. The National Competition Policy review concluded that the cap did not appear to be effective in controlling fund costs and is not relevant to prearranged funds, which are the overwhelming dominant product in the marketplace.

Other prudential legislation may require the disclosure of a fee or charge, but does not seek to set a maximum level. On this basis, the bill proposes the removal of the cap on management expenses for both types of funds, as other provisions relating to the disclosure of benefits and charges affords greater consumer protection than the current cap mechanism. However, the Government feels that it is important for some consumer protection controls to be retained in this area. It is therefore proposed that the commissioner will continue to be able to direct a contributory fund to reduce its management expenses or to improve the level of benefit payable to the consumer. The bill also proposes the extension of this provision to prearranged funds in recognition of the fact that, with this type of fund, it is the funeral director who bears the risk of the fund moneys being potentially eroded by excessive management fees.

Another provision of the Act that the review considered to be outdated is the entry requirement on funeral contribution funds, which requires that the name of the fund include the words "Funeral Contribution Fund". While this provision may have been originally introduced to ensure that consumers knew, in no uncertain terms, that they were dealing with a funeral contribution fund, there are currently no naming restrictions on prearranged funds. In addition, the nature of the fund would become quickly evident when consumers are presented with the paperwork to join the fund, which would specify the need for small, regular contributions to be made. The review therefore concluded that requiring a company to have certain words in its name imposes an unjustifiable restriction on trade. Accordingly, the bill recommends this provision for repeal.

The bill extends the provision that enables an application for registration to be refused on the grounds of character and reputation to contributory funds. This provision enables the registrar, currently the Commissioner for Fair Trading, to refuse an application for registration if there is potential for the applicant to have an undesirable impact on the industry or on consumers. For example, an individual might be refused if he or she is known to have a poor record in relation to business failures or consumer complaints.

The review of the Act concluded that the benefits of being able to prevent an applicant from entering the funeral fund industry outweigh the costs of excluding a person from the industry. However, this provision currently only exists for prearranged funeral funds. Enabling an application for the registration of a funeral contribution fund to be refused on the grounds of character and reputation brings them into line with prearranged funds, and will ensure that disreputable individuals will be excluded from participating in the management of both types of funeral funds.

Another provision created by the bill is one that allows guidelines for the approval of transfers and amalgamations of funds to be prescribed. Under the Act, the commissioner's approval must be sought when funds propose to amalgamate with, or transfer to, another business. This provides the commissioner with an opportunity to scrutinise any proposed transfers and amalgamations to ensure that funds will be administered carefully. Given that new managers will be taking over the fund management, it is important to ensure that they are capable of meeting the standards set by the legislation. The bill enables guidelines to be set to assist the commissioner in making determinations on a scheme of transfer or amalgamation.

The bill also extends some of the grounds for cancellation of prearranged funds to contributory funds. The cancellation powers of the commissioner differ for each fund. The grounds on which prearranged funds may be cancelled include the circumstances in which a fund is being wound up, is under official management or has ceased to act as a trustee; a receiver has been appointed; a fund or person connected with it is convicted of an offence; or the fund decides that it no longer wants to operate. However, there are very limited grounds for cancellation of contributory funds, and these do not include provisions related to misdeeds of management or where there is a wind-up of the fund or if the fund is under administration. The bill provides for similar cancellation grounds for both types of funds. A further feature of the bill is the removal of the requirement for a funeral contribution fund to carry on no other business and replacement with the restriction that currently applies to prearranged funds.

There is currently a difference between the requirements for contributory funds and pre-paid funds in respect of the restrictions on the type of business to be carried on. While prearranged funds are only restricted from running a funeral fund as part of a funeral director business, contributory funds are not entitled to carry on any other business. This is considered quite limiting and appears to mean that a contributory fund cannot diversify and cater for other types of financial products or any other form of business. As this is considered anti-competitive, it is proposed that the same restriction for prearranged funds apply to contributory funds. The bill introduces a power to enable the commissioner to take action against a fund if the directors or trustees of the company change and they are deemed to be of questionable character or reputation.

As the Act is currently drafted, the commissioner has the ability to refuse an application for registration based on the

character and reputation grounds or to not approve the transfer of ownership or amalgamations of funds, if there were concerns about character or reputation of the proposed fund managers, for example. However, there is currently no power to prevent someone of questionable repute becoming involved in the management of the fund if there is a change of personnel in the same company. This amendment closes that gap by enabling the commissioner to request the fund to show cause why the fund's registration should not be cancelled if such a person became involved with the fund's management. The bill also introduces a provision that makes it an offence to lodge any documents with the commissioner that make false and misleading statements or that omit information that would make such material misleading in content. This provision strengthens the commissioner's powers to take action against a fund if, for example, a fund has sought to misrepresent the financial stability of its investments or has not fully disclosed all management expenses charged to administer the fund.
Another provision of the bill is the extension of the requirement for actuarial assessment to pre-arranged funds. Currently, both types of funds must provide audited annual reports to the commissioner and contributory funds must also undergo actuarial assessment every three years or as required. The review considered that the requirement for actuarial assessment enhanced fund accountability and that both funds should be subject to this requirement. The bill also proposes some changes to the administration of the actuarial reporting requirements, such as the introduction of a provision enabling the commissioner to request the entire actuarial report prepared in relation to a fund, if deemed necessary. Currently the Act only requires funds to provide an abstract of the actuarial report, which is to contain certain particulars. However, it is appropriate that the commissioner have the power to request the whole actuarial report, not just the abstract if considered necessary.

Another new provision enables the office to engage an independent actuary to assist in assessing the actuarial reports submitted by funds. Under the new arrangements, the commissioner will also be able to give such directions to the fund as considered necessary if a deficiency is detected in the assets of a fund. This may include requiring the fund to cease taking new business or to show cause as to why they should be able to continue as a fund. The bill also gives the commissioner the power to waive the requirement for actuarial assessment for both types of funds. This provision may be utilised, for example, where it is deemed an unnecessary requirement for funds that have been previously exempt funds and are no longer accepting new business and therefore have a small number of members remaining. There are also a number of matters arising from the bill that will be dealt with in the regulation. These details predominantly relate to requirements for pre-arranged contracts and will enable provisions to be prescribed at a future date to ensure that consumers better understand their entitlements under their contracts and to make pre-arranged contracts clearer.

This is to be achieved in the bill by requiring a pre-arranged fund to provide certain information to the consumer before they enter into a pre-arranged contract, which would effectively operate as a mandatory disclosure requirement to consumers. The bill also extends the regulation-making power under the Act to enable information that must be provided to the consumer to be prescribed, such as the terms of cancellation and any aspect of the funeral service that is not covered by the contract. The bill also provides that a regulation may be made in the future to enable consumers to transfer their pre-payments between funds and between funeral directors, which would be in addition to the existing refund provisions of the Act. Another area to be addressed in the regulation is a provision that will allow for a time limit to be prescribed within which agents of funeral funds must lodge payments made by consumers for pre-paid funerals with a registered funeral fund.

I will ensure that there is an appropriate level of consultation with consumers, industry bodies and the funeral funds themselves prior to any new requirements being introduced through regulation in these areas. The bill also seeks to modernise the terminology used in the legislation in relation to pre-paid funeral arrangements to better reflect industry practice. An arrangement currently exists that is not covered by the legislation whereby consumers may go to a funeral director and discuss their preferences for a particular style of funeral. The funeral director may record these preferences for future use, but no formal agreement is entered into for the supply of that funeral service and no money changes hands. In these cases, it is the responsibility of the family or executor of the person's estate to arrange the funeral and to pay for it at that time. These arrangements are typically referred to in the funeral industry as a pre-arranged funeral.

However, the legislation currently uses the term "pre-arranged" to refer to what is more commonly known in the industry as a "pre-paid" funeral. This inconsistency in terminology may have contributed to uncertainty for consumers about the nature of the funeral arrangements that they have in place. Accordingly, the bill proposes the replacement of the term "pre-arranged" in the legislation with the use of the term "pre-paid" funeral fund to better reflect industry terminology and to reduce confusion for consumers about the different types of funeral arrangements available. The Funeral Funds Amendment Bill introduces reforms to strengthen the prudential management of funeral funds in New South Wales and to enhance protection for consumers who deal with these funds. The reforms will be of benefit to both industry and consumers. I commend the bill to the House.