

Funeral Funds Amendment Bill 2003

Explanatory note

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

Overview of Bill

The *Funeral Funds Act 1979* regulates the operation of funeral contribution funds (where a member makes regular payments which contribute to a funeral service or provide a cash benefit towards the cost of the service) and pre-paid funeral funds (where the consumer enters into a pre-paid contract for a specific service). Specifically, the *Funeral Funds Act 1979* aims to protect pre-payments made by consumers for funeral services through the registration of funeral funds. The object of this Bill is to amend the *Funeral Funds Act 1979* (the **principal Act**):

- (a) to remove the current exemptions from the application of the Act so that all persons carrying on funeral fund businesses are required to be registered under the Act, and
- (b) to update the requirements for registration of a funeral fund, and
- (c) to provide for reporting by funds to the Director-General and to members of funds, and
- (d) to provide for actuarial investigations of funds, and
- (e) to provide power for the Director-General to impose disciplinary measures on funds, and
- (f) to provide for appeals against decisions of the Director-General, including decisions to refuse registration, to register funds subject to conditions, to cancel registration of a fund and to impose disciplinary measures on a fund, and
- (g) to allow the Director-General to appoint an independent actuary to assist the Director-General in performing his or her functions under the Act, and
- (h) to remove the cap on the maximum level of a benefit that may be paid through a funeral contribution fund, and
- (i) to remove the requirement that a funeral benefit business open and maintain a bank, building society or credit union account in New South Wales, and
- (j) to remove the cap on the management expenses that may be charged by fund, and
- (k) to make other miscellaneous amendments, including omitting redundant provisions and updating terminology used in the Act to reflect current industry practice.

Outline of provisions

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 is a formal provision giving effect to the amendments to the *Funeral Funds Act 1979* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Funeral Funds Regulation 2001* set out in Schedule 2.

Schedule 1 Amendment of Funeral Funds Act 1979

Schedule 1 [1] makes a global change to the Act to replace references to the term “pre-arranged” with references to the term “pre-paid”. This accords with current industry terminology which uses the terms “pre-paid contract” and “pre-paid funeral fund” (instead of “pre-arranged contract” and “pre-arranged funeral fund” as currently referred to in the principal Act).

Schedule 1 [2] inserts proposed section 3 into the principal Act. The proposed

section specifies that the objects of the Act are as follows:

(a) to protect pre-payments made by consumers for funeral services through the registration of funeral funds, and

(b) to ensure that funeral services agreed to be supplied under a pre-paid contract are supplied as agreed, and

(c) to achieve accountability for money paid by a purchaser of funeral services that have an indefinite delivery date, and

(d) to properly manage money paid and other valuable consideration given for funeral services in the long term to provide agreed benefits to the purchaser and the anticipated payment to the supplier of funeral services.

Schedule 1 [3] inserts definitions of *authorised deposit-taking institution* and *officer* of a corporation.

Schedule 1 [4] replaces the definitions of *Department* and *Director-General* used in the principal Act to reflect recent administrative changes in the administration of the Act. *Department* is defined to mean the Department of Commerce and the *Director-General* to mean the Commissioner of Fair Trading in that Department or, if there is no such position in the Department, the Director-General of that Department. **Schedule 1 [38]** makes a consequential amendment to section 74A of the principal Act.

Schedule 1 [5] replaces the definition of *funeral contribution fund*. A funeral contribution fund is defined to mean a company registered under section 14 of the Act to carry on contributory funeral benefit business or a person registered under section 16C to carry on that business.

Schedule 1 [6] and [17] amend the principal Act by way of statute law revision to update outdated references.

Schedule 1 [7] inserts proposed section 10 into the principal Act. The proposed section provides that the Director-General may appoint an independent actuary (actuary is defined in section 4 (1) of the principal Act) to assist the Director-General in performing his or her functions under the Act. For example, the Director-General may appoint an actuary:

(a) to provide advice in relation to the ability of an applicant for registration to carry on a funeral fund successfully and in compliance with the provisions of the Act that would be applicable to the applicant if registered, or

(b) to assist the Director-General in conducting an inquiry under Division 2 of Part 5 of the principal Act into the affairs, or such of the affairs as the Director-General determines, of a funeral fund.

Section 11 (1) of the principal Act presently provides that a person must not carry on or advertise that the person carries on or is willing to carry on any contributory funeral benefit business unless the person is registered under the Act to carry on such a business or is exempt from the application of that section.

Section 11 (3) sets out the circumstances in which a person is exempt from the application of the section. **Schedule 1 [8] and [9]** amend section 11 to remove the provisions relating to exemptions so that any person carrying on or advertising that the person carries on or is willing to carry on any contributory funeral benefit business must be registered under the Act. **Schedule 1 [27] and [28]** make similar provision in respect of persons acting as trustees of trust funds under pre-paid contracts who were previously exempt from the application of the Act.

Schedule 1 [10] amends section 13 of the principal Act to alter the requirements for registration of a company to carry on contributory funeral benefit business. The current requirement that the company carry on no business other than contributory funeral benefit business is removed and replaced with a requirement that the income of the company derived from contributory funeral

benefit business is to be applied only for the provision of funeral benefits to contributors and to meet the management expenses of the company in carrying on contributory funeral benefit business.

Schedule 1 [11] amends section 13 (1) (d) of the principal Act to remove the requirement that a company carrying on contributory funeral benefit business have a maximum of 7 directors.

Schedule 1 [12] replaces section 13 (1) (e) of the principal Act to remove the requirement that a company carrying on contributory funeral benefit business have the words “Funeral Contribution Fund” in its name. **Schedule 1 [14]** makes a consequential amendment to section 13 (2) of the principal Act.

Schedule 1 [13] omits section 13 (1) (g) of the principal Act to remove the cap on the maximum level of a benefit that may be paid through contributory funeral benefit business.

Schedule 1 [15] amends section 14 (2) of the principal Act to enable the Director-General to refuse to register a company to carry on contributory funeral benefit business on the grounds of the character and reputation of the directors and other officers of the company.

Schedule 1 [16] amends section 16 of the principal Act to provide that the Director-General may, by notice in writing served on a funeral contribution fund, cancel the fund’s registration if:

- (a) the fund has not commenced to carry on contributory funeral benefit business in New South Wales within 6 months after its registration, or
- (b) the fund is commenced to be wound up or is under official management, or
- (c) the fund has entered into a compromise or scheme of arrangement with its creditors, or
- (d) a receiver and manager has been appointed, whether by the Supreme Court or otherwise, in respect of the property of the fund, or
- (e) the fund or any person involved in the management of the fund is convicted of an offence involving fraud or dishonesty or fails to comply with a provision of this Act or the regulations, or
- (f) at the request of the fund, or
- (g) on any other ground prescribed by the regulations.

Schedule 1 [18] inserts proposed Division 1A of Part 3 (proposed sections 16B and 16C) into the principal Act. The proposed Division provides for the registration of funeral contribution funds that were previously exempt under section 11 or 97A. (**Schedule 1 [8] and [9]** amend section 11, and

Schedule 1 [53] omits Division 1A of Part 8, to remove the provisions allowing for the exemption of certain persons from the application of certain provisions of the Act relating to funeral contribution funds). Proposed section 16B provides that a person carrying on the business of a funeral contribution fund who was previously exempt from the application of the Act must apply, within 6 months after the commencement of the Division, to be registered to carry on that business. Proposed section 16C provides that the Director-General may register such a person to carry on contributory funeral benefit business, register the person subject to conditions or refuse to register the person. The Director-General may register a person to carry on such a business even if the person does not comply with certain of the requirements for registration if the Director-General is satisfied that registration of the person subject to conditions would protect contributors to the fund. For example, the Director-General may impose as a condition of registration that the fund must not after registration accept any new contributors to the fund.

The Director-General may also exempt a person registered under proposed section 16C from complying with specified provisions of the Act or the regulations if, in all the circumstances, the Director-General considers it

appropriate. If the Director-General refuses under section 16C to register a person to carry on contributory funeral benefit business the person must transfer any contributions he or she holds to a fund registered under the Act.

Schedule 1 [30] inserts proposed Division 1A of Part 4 (proposed sections 39A and 39B) which makes similar provision in relation to the registration of persons acting as trustees of trust funds under a pre-paid contract and who were previously exempt from the application of the Act under sections 34 (2) and 114B of the principal Act. **(Schedule 1 [28] and [29]** amend section 34, and **Schedule 1 [56]** omits Division 1A of Part 9, to remove the provisions allowing for the exemption of certain persons from the application of certain provisions of the Act relating to pre-paid funeral funds).

Schedule 1 [19] replaces section 21 of the principal Act. Proposed section 21 provides that a funeral contribution fund is entitled to receive a commission for its services in acting as trustee of trust funds and removes existing limitations on the maximum amounts of management expenses that may be paid to the fund.

Schedule 1 [34] replaces section 46 of the principal Act to make similar provision in relation to pre-paid funeral funds and to remove the existing provision for pre-paid funeral funds to be reimbursed for any reasonable and necessary expenditure directly related to the administration of trust funds held by them. It also removes the existing power to prescribe the maximum amount of a commission that may be received.

Schedule 1 [20] amends section 22 of the principal Act to replace the requirement that a funeral contribution fund open and maintain accounts with one or more banks, building societies or credit unions in New South Wales with the requirement that it open and maintain such accounts with one or more authorised deposit-taking institutions within the meaning of the *Banking Act 1959* of the Commonwealth. **Schedule 1 [33]** amends section 43 of the principal Act to make similar provision in relation to pre-paid funeral funds.

Section 24 of the principal Act provides that a funeral contribution fund must lodge a return, on an annual basis, containing specified particulars.

Schedule 1 [21] amends section 24 to provide that the Director-General may exempt a funeral fund from complying with that requirement if the Director-General is satisfied that the fund is subject to adequate reporting requirements under a law of the Commonwealth.

Schedule 1 [22] inserts proposed section 25A into the principal Act. Proposed section 25A provides that a funeral contribution fund must, on an annual basis or at such other times as are prescribed by the regulations, give to each contributor to the fund a report containing the particulars prescribed by the regulations.

Section 28 of the principal Act provides that a funeral contribution fund must have an actuarial investigation of the financial position of the fund carried out within specified times. **Schedule 1 [23]** amends section 28 to provide that the Director-General may waive the requirement to carry out such an investigation if the Director-General is satisfied that, in all the circumstances, it would be unduly onerous or otherwise unwarranted to require the investigation.

Schedule 1 [24] replaces section 30 of the principal Act and provides for the action that may be taken if the Director-General is satisfied (whether as a result of an actuarial investigation carried out under section 28 or of an inquiry instituted by the Director-General) that the assets of a fund are insufficient to meet its liabilities or the rate of its management expenses is unduly high.

Schedule 1 [25] amends section 31 of the principal Act to provide that the regulations may make provision for or with respect to guidelines to be used by the Director-General in deciding whether to confirm, or refuse to confirm, the scheme for transfer or amalgamation of the business of a funeral contribution

fund. **Schedule 1 [32]** amends section 42 of the principal Act to make similar provision in relation to the transfer of trust funds under pre-paid contracts.

Schedule 1 [26], [54] and [55] amend sections 32 and 105 (respectively) of the principal Act to remove references to the Government Actuary and replace them with references to an actuary.

Schedule 1 [29] amends section 37 of the principal Act to provide that the Director-General must refuse to register an applicant for registration to act as trustee of trust funds under pre-paid contracts if the Director-General is satisfied the applicant will not be able to carry on pre-paid funeral benefit business successfully.

Schedule 1 [31] amends section 40 of the principal Act to enable regulations to be made with respect to the payment or giving of money or other valuable consideration to a pre-paid funeral fund under the Act. The amendment will enable regulations to be made, for example, to specify the period within which a payment must be made.

Schedule 1 [35] inserts proposed Divisions 3A (sections 49A and 49B), 3B (sections 49C–49F) and 3C (sections 49G–49I) of Part 4 into the principal Act. Proposed section 49A provides that a pre-paid funeral fund must have an actuarial investigation of the financial position of the fund carried out at specified times. The Director-General may waive the requirement to carry out such an investigation if the Director-General is satisfied that, in all the circumstances, it would be unduly onerous or otherwise unwarranted to require the investigation. Proposed section 49B provides for the action that may be taken if the Director-General is satisfied (whether as a result of an actuarial investigation carried out under section 49A or an inquiry instituted by the Director-General) that the assets of a fund are insufficient to meet its liabilities or the rate of its management expenses is unduly high. Proposed Division 3B provides for the auditing of a pre-paid funeral fund by an independent auditor, including specification of the qualifications such an auditor must possess and the reports the auditor must provide. Proposed Division 3C provides for funeral funds to provide annual returns about the fund's business to the Director-General and the public inspection of such returns. The Director-General may exempt a funeral fund from complying with the requirement to lodge an annual return if the Director-General is satisfied that the fund is subject to adequate reporting requirements under a law of the Commonwealth. Provisions requiring annual reporting are presently contained in the *Funeral Funds Regulation 2001*.

Schedule 2 makes consequential amendments to that Regulation to omit those provisions.

Schedule 1 [36] inserts proposed section 49J into the principal Act. The proposed section enables a person who enters into a pre-paid contract with a prepaid funeral fund to end the agreement by notice in writing given to the fund within the period after entry into the contract prescribed by the regulations.

Schedule 1 [37] inserts proposed Division 3A of Part 5 (sections 66A and 66B) into the principal Act. Proposed section 66A provides that the Director-General may give a notice to a fund to show cause why disciplinary measures should not be taken with respect to the fund. The circumstances in which the Director-General may give such a notice are as follows:

- (a) the fund is no longer able to carry on business successfully,
- (b) the fund no longer satisfies the requirements for registration,
- (c) the fund is no longer fit to be registered having regard to the character and reputation of the directors and other officers of the company or, if the funeral fund is an individual or group of individuals, the character and reputation of those individuals,
- (d) the fund is not complying with the conditions, if any, of its registration.

Proposed section 66B specifies the disciplinary measures that the Director-General may impose if satisfied that the grounds in the show cause notice have been established. The disciplinary measures that may be taken include requiring the person to comply with a requirement specified by the Director-General, suspending registration for not more than 12 months or cancelling registration.

Schedule 1 [39] amends section 75 of the principal Act to provide that a person refused registration to carry on contributory funeral benefit business under proposed section 16B may appeal against that refusal to the Supreme Court.

Schedule 1 [41] makes a consequential amendment.

Schedule 1 [40] amends section 75 of the principal Act to provide that if the Director-General refuses under proposed section 16C to exempt a person registered under that section from complying with a provision of the Act or regulations the person may appeal against that refusal to the Supreme Court.

Schedule 1 [42] inserts proposed sections 75A and 75B into the principal Act. Proposed section 75A provides for an appeal to the Supreme Court against a decision of the Director-General to register a person to carry on contributory funeral benefit business subject to conditions. Proposed section 75B provides a right of appeal against a decision of the Director-General to cancel the registration of a funeral contribution fund under section 16 of the principal Act.

Schedule 1 [43] amends section 77 of the principal Act to provide a right of appeal to the Supreme Court against a decision of the Director-General under proposed section 39B to refuse to register a person to act as trustee of trust funds under pre-paid contracts.

Schedule 1 [44] amends section 77 of the principal Act to provide that if the Director-General refuses under proposed section 39B to exempt a person registered under that section from complying with a provision of the Act or regulations, the person may appeal against that refusal to the Supreme Court.

Schedule 1 [45] makes a consequential amendment.

Schedule 1 [46] inserts proposed section 77A into the principal Act. Proposed section 77A provides for an appeal to the Supreme Court against a decision of the Director-General to register a person to act as trustee of trust funds subject to conditions.

Schedule 1 [47] inserts proposed section 79A into the principal Act. Proposed section 79A provides for an appeal to the Supreme Court against a decision of the Director-General to impose disciplinary measures on a person's registration.

Schedule 1 [50] amends section 82 of the principal Act to provide that the Director-General is deemed to have refused an application under proposed section 16B or 39A if the Director-General does not give a decision on the application within 6 months after it is made. The effect of a deemed refusal is to create a right of appeal against that refusal to the Supreme Court.

Schedule 1 [48] and [49] make consequential amendments.

Schedule 1 [51] inserts proposed section 85A into the principal Act. Proposed section 85A creates offences in relation to making false or misleading statements in documents required for the purposes of the Act or lodged with the Director-General. The offences include omitting anything from a document so as to make the document misleading in a material particular.

Schedule 1 [52] amends section 92 (the general regulation-making power) of the principal Act to provide that regulations may be made for or with respect to:

- (a) the transfer of contributions made by a contributor from one funeral contribution fund to another such fund, and
- (b) the transfer of trust funds from one pre-paid funeral fund to another such fund, and
- (c) the transfer of a contract from one funeral director to another funeral director, and

- (d) the requirements for actuarial investigations of pre-paid funeral funds, and
- (e) the information that must be provided to a consumer before a pre-paid contract is entered into, and
- (f) without limiting paragraph (e), the information that must be provided to a consumer about the funeral services that will be provided under a pre-paid contract, including information about the funeral services that are not covered by the contract, and
- (g) the information that must be included with a pre-paid contract, including information relating to cancellation of the contract.

Schedule 1 [53] and [56] omit Division 1A of Part 8 and Division 1A of Part 9 which contain redundant savings and transitional provisions.

Schedule 1 [57] inserts proposed Part 10 into the principal Act to make provision for savings and transitional matters.

**Schedule 2 Amendment of Funeral Funds
Regulation 2001**

Schedule 2 [1] and [3] replace references in the Regulation (except clauses 14 and 17–22) to the term “pre-arranged” with references to the term “pre-paid” as a consequence of the amendments to the principal Act made by Schedule 1 [1].

Schedule 2 [2] and [4] omit clauses 8 and 14 of the Regulation as a consequence of the amendments to sections 21 and 46 of the principal Act made by Schedule 1 [18] and [33].

Schedule 2 [5] omits clauses 17–23 of the Regulation as a consequence of the insertion by Schedule 1 [34] of proposed Division 3C of Part 4 into the principal Act. **Schedule 2 [6] and [7]** make consequential amendments to the table to clause 24.