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All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215
DX 13025 Sydney Market Street

Mr Alexander Chidzey
Principal Policy and Project Manager
Cemeteries & Crematoria NSW
NSW Department of Industry – Lands & Water
Level 12, 10 Valentine Avenue
Parramatta NSW 2124

Contact
Vera Visevic +61 2 8289 5812
Email: vvisevic@millsOakley.com.au
Fax: +61 2 2 9247 1315

By email: alexander.chidzey@industry.nsw.gov.au;
ccnsw.info@cemeteries.nsw.gov.au

Disclaimer: this submission is not intended to be legal advice

Dear Mr Chidzey

Submission: Cemetery and Crematorium Operator Code of Practice

Thank you for the opportunity to provide a written submission in relation to the draft Cemetery and Crematorium Operator Code of Practice (**Code**).

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:

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

2. Summary

2.1 Overview

In summary, this submission aims to emphasise the following points:

- It is recommended that the Cemeteries & Crematoria Agency NSW (**CCNSW**) implement a public opt-in register for operators to register their compliance with the Code.
- Part 6 of the Code could be perceived as overly onerous on operators. Accordingly, we request some clarity around the obligations imposed on operators.
- The Code could provide greater clarity on how to calculate the funds which need to be set aside for the perpetual maintenance of facilities, graves, vaults, cemeteries and crematoria.
- The complaints resolution process should be made clearer by:
 - providing an example complaints resolution process;
 - providing requirements as to access to the complaints resolution process; and
 - examples of which complaints could be managed using the process.
- The Code could provide greater clarity on the granting of interment rights, the records that need to be prepared and kept by operators, and the closure of a cemetery or crematorium.
- The Code could provide examples of the appropriate evidence required for refusing to grant an interment right and examples of the procedure operators are to follow when considering orders for interment.
- The Code should include a declaration of acceptance of the Code of Practice at the end of the Code for completion and execution by the operators.
- The list of laws and guidelines at the end of the Code should include the relevant sections with which the operators must comply.

3. Submission

For the purpose of this submission, I will discuss the following:

- the introduction of a public opt-in register;
- the provision of information and disclosure by operators;
- the maintenance of facilities, graves, vaults, cemeteries and crematoria;
- the complaints resolution process;
- the legislative obligations pertaining to interment rights;
- a declaration of acceptance by the operator; and
- legislative compliance.

3.1 Public register

The intention of the Code is that it: *"...is not mandatory until such time as an interment industry scheme is established by regulation under section 31 of the Act."*

It is suggested that CCNSW implement and operate an opt-in register, viewable by the public, which lists those operators which have registered their compliance with the Code. This will give operators the opportunity to benefit from any increase in consumer confidence and trust that may be derived from operating under the Code. Further, since an objective of the Code is to *“improve transparency in the sector and increase certainty for consumers,”* a public register would achieve this objective.

The public register would be similar to the opt-in register which is in place for the *Privacy Act 1988* (Cth).

3.2 Part 6 – Provision of information and disclosure

The Code requires the operator to inform the client that it has adopted and complies with the Code. The Code should provide clarity on how operators are required to comply with this section. For example, does the operator need to inform the client in writing or is verbal information sufficient?

Part 6 of the Code provides that *“Operators will in the ordinary course of business, assist in the education of the public about the industry, choosing a provider and the costs and procedures relating to funerals, burials, cremations and memorialisation.”*

This part of the Code is overly onerous on operators. Further, the education of the public about the industry should be the responsibility of CCNSW and not individual operators.

3.3 Part 8 – Maintenance of facilities, graves, vaults, cemeteries and crematoria

The Code requires operators to set aside sufficient funds as part of their financial planning for the maintenance responsibilities of cemeteries after closure. Both the *Cemeteries and Crematoria Act 2013* (NSW) (**Act**) and the Code provide no guidance on how to calculate the funds which need to be set aside. The Code could provide more information on this point, such as a formula which cemeteries could apply to calculate the necessary funds to set aside.

3.4 Part 9 – Complaints and disputes

Part 9 of the Code provides that *“Operators will establish a complaints resolution process in accordance with the code.”*

The Code should provide clarity on what *“...in accordance with the code”* means, as it is unclear if this is referring to the Australian/New Zealand Standard AS:NZS 10002:2014 Guidelines, as mentioned in clause 9.6, or the brief procedure outlined in clause 9.7. It is suggested that an annexure to the Code could be an example complaints resolution process for operators to follow.

It may also be necessary for requirements to be included in the Code regarding how and when clients need to be advised of the operator’s complaints resolution process. For example, does the process need to be readily available on the operator’s website, or is it sufficient that material on the process be provided on request by the client?

The Code could provide examples of the types of complaints and disputes which could be managed through the complaints resolution process, as well as tailored principles for the different issues. Our clients often receive complaints about the following matters:

- access by relatives to church grounds, memorial gardens, etc.;
- closure of church grounds, memorial gardens, etc.; and
- the right to erect memorials once the deceased has been interred.

It would be beneficial to the operator and the client if the complaints resolution process were more detailed in the Code, potentially including examples.

3.5 Part 10 – Legislative obligations pertaining to interment rights

3.5.1 Historical failure to keep records

Part 10 of the Code does not provide any further guidance regarding the granting of interment rights which occurred prior to the introduction of the Act. A problem we have often encountered is that operators historically have failed to keep sufficient records for the granting of interment rights. These operators are at a loss as to how to determine the veracity of claims made by people about the grant of prior interment rights in the absence of records. It would be beneficial if the Code could provide some guidance on how to deal with the situation.

3.5.2 Identify the interment site

The Code requires the operators to ensure that interment right holders are aware of which cultural and religious groups are located around the chosen site. This can be an overly onerous obligation. How are operators to ensure that interment right holders are aware of this, especially in cemeteries where there is no separation of rights based on culture or religion.

3.5.3 Identify the specific conditions associated with that site

Part 10 provides that *“Operators must ensure the interment right holder is advised in clear terms of the conditions that apply to the site (for example, possible depth given soil conditions, monument type, size of fonts and dimensions allowed).”*

We understand the intent and benefit of this part in the Code, however, it is not clear how the operator is mean to satisfy this obligation. For example, is the operator required to give the client this advice in writing or is verbal advice sufficient? If the operator provides the advice verbally, how does the operator prove the advice was given to the client?

3.5.4 Certificate for interment right

Operators who grant or renew an interment right, or transfer an interment right, must issue a certificate to the person to whom the right is granted, renewed or transferred. The Act provides that a certificate is to be in the form prescribed by the regulations or approved by the CCNSW. We are not aware of a certificate being prescribed by the regulations or approved by the CCNSW. To provide clarity to operators, the Code could provide an example of a certificate approved by the CCNSW.

3.5.5 Refusing to grant an interment right

Part of 10 the Code does not provide any further guidance than the provisions in the Act regarding when an interment right can be refused.

The Code sets out that an operator must support a refusal with an appropriate level of evidence and appropriate documentation. However, there is no guidance as to what will be considered appropriate.

Operators need to know the level of evidence required to document the reasons for refusal. Another annexure to the Code could be a pro forma document which an operator must complete, if it intends to refuse a grant of an interment right. This would ensure that the appropriate evidence is collected by the operator, and the operator complies with the Act.

3.5.6 When a dispute arises about the holder of an interment right

Both the Act and Code provide that the operator must display a notice about their intention to make a decision in a prominent position in the cemetery. The Act and Code do not provide any guidance on what would be considered a “prominent position.” The Code could clarify the meaning of “prominent position” so that operators can maintain compliance with the Act and Code.

3.5.7 Record a bequest of an interment right

The Code provides that the recipient of the bequest must make an application on an appropriate form to the operator for the cemetery operator register to be amended. The Act provides that an application is to be in the form prescribed by the regulations or approved by the CCNSW. We are not aware of an application being prescribed by the regulations or approved by the CCNSW. To provide clarity to operators the Code could provide an example of an application approved by the CCNSW.

3.5.8 Closure of cemeteries

The Code provides that operators must “...ensure that if an operator **ceases to operate a cemetery** then their cemetery operator register must be sent to CCNSW or disposed of as directed by CCNSW” and “...Should the **crematorium close** then the documents must be sent to CCNSW.”

The Act is silent on the circumstances in which a cemetery or crematorium is permitted to, or deemed to, be closed. CCNSW has issued a factsheet regarding the sale of “closed cemeteries”. In the factsheet, the regulator refers to cemeteries which are full, and which cannot accept any new interments, as being closed. However, both the Act and the Code fail to definitively provide information on when a cemetery or crematorium is permitted to, or deemed to, be closed and the process for the closure of a cemetery or crematorium.

The Code should clarify the process that is required to close cemeteries and crematoria, so that cemeteries and crematoria can ensure compliance with the Act.

3.5.9 Orders for Interment

The Code requires operators to publish a procedure to be followed to obtain an order for interment. It is suggested that CCNSW provide an example of the procedure that operators are to follow as an annexure to the Code.

3.6 Declaration of Acceptance

The Industry Code of Practice – Interment Rights and General Services provides a “Declaration of acceptance of the Code of Practice” at the end of the Code for completion and execution by the operator. A similar declaration should be included in the Code, as this will reinforce to the operators the need to consistently comply with the Code. This would support the objective of the Code to, “ensure that operators demonstrate satisfactory levels of accountability, transparency and integrity.”

3.7 Legislative Compliance

At the end of the Code, a list of laws and guidelines is provided which the cemetery and crematoria industry must comply with. It would be useful if at least some of the relevant sections of the laws and guidelines is also listed, so that it is easier for operators to understand their obligations.

I respectfully urge CCNSW to consider the issues and recommendations raised in this submission when conducting its review of the Code.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Vera', with a stylized, flowing cursive style.

**VERA VISEVIC
PARTNER**

**(CO-AUTHORED WITH ALISON SADLER, LAWYER AND JOHN VAUGHAN-WILLIAMS,
LAWYER)**