



Advisory Note

Interment rights and sales of closed cemeteries

The purpose of this advisory note is to assist cemetery operators with understanding the application of Part 4 of the *Cemeteries and Crematoria Act 2013* (“the Act”) and in particular the issue of ongoing legacy rights for cemeteries closed to new interments (whether full burials or ashes) and those which may be the subject of sale for non-cemetery purposes.

Interment rights under Part 4

Part 4 of the Act establishes the legal concept of the interment right and enshrines the principle of perpetual interment right together with a range of compliance requirements. The Act applies some of the scheme of the Act regulating interment rights to both an existing burial licence granted by a reserve trust over Crown land under the *Crown Lands Act 1989* and any right, licence or other entitlement in the nature of an interment right granted otherwise over other land not controlled by a Crown reserve trust.

An existing burial licence or agreement is preserved on the original terms on which it was granted prior to the commencement of Part 4 of the Act. A burial licence or agreement without a fixed term is made a perpetual interment right under the Act. A burial licence or agreement with a fixed term is made a renewable interment right under the Act with the same term as it previously had.

Legacy burial rights will not be revived where they have been exhausted through use and therefore are not in existence at the commencement of section 45 of the Act. Under the existing law, a burial licence or other right is likely to be spent once it is exercised by burial and the body has dissolved. A spent right therefore is not revived by section 45 of the Act.

Under Part 4 of the Act, an interment right that is perpetual will probably not be spent on the dissolution of the body after burial. In this sense, the Act makes a perpetual interment right in real terms, truly perpetual under section 48(a) of the Act.

Where a cemetery operator seeks to extinguish or limit legacy burial rights, the only provisions of Part 4 that may be applied are: section 46 (with the consent of the holder), section 52 (revocation of a perpetual right not exercised within 50 years of the grant), section 55 (re-use of an expired renewable interment right) and section 59 (transfer of interment right to a cemetery operator).

Closed cemeteries and the sale of inactive cemetery land for other purposes

The overall status of land that has previously been used as a cemetery and may later be sold or where there is intention for it to be sold but no intention for it to be used as a cemetery, will need careful consideration.

Land that has previously been operating as a cemetery but is no longer being used for that purpose is unlikely to be defined as a “cemetery” under the Act. To be defined as a “cemetery”, the land would be required to be used primarily for the interment and memorialisation of human remains.

Of particular importance is that previously granted interment rights or burial licences over the land may still exist. If a new owner of the land is not a cemetery operator, that owner may still have obligations in relation to any existing interment rights.

Where an aged cemetery has ceased operating and has been transferred to a private owner, there is a possibility that the private owner has obligations in relation to legacy burial rights. Any seller or buyer of land affected by a cemetery should obtain legal advice about their obligations under the Act.

There is no provision in the Act or other NSW legislation that would enable non-council owned land to be deemed as a 'closed' cemetery and to decline to honour 'legacy' rights claimed by descendants of persons buried in aged grave plots and cemeteries. Legacy rights may exist for interment right holders and include rights of access and maintenance of the grave site.

Schedule 4 of the Act retains a provision for councils to seek approval from the Minister to convert a closed cemetery into a public park. There are a number of steps which are required to be taken before a closed cemetery can be converted into a public park.

If an aged or inactive cemetery is sold to a private owner for non-cemetery purposes, it is strongly recommended that as a condition of the contract for sale the purchaser be required to register an easement and a covenant specified in the easement or in an Order (where the land is sold by the Uniting Church, accordance with section 88D of the *Conveyancing Act 1919*) on the title of the land to ensure that the private owner provides the public with unrestricted access to the cemetery and that such access is always available in an easy, safe and direct manner. The intent of the easement and covenant will be to enable family members and friends to visit and occupy the cemetery for temporary periods of time to pay respects to their deceased relatives, viewing the headstones, laying ashes, commemoration of those persons named in the headstones and quiet contemplation. The Order should include provisions relating to the protection and retention of memorials and commemorative items that exist on the cemetery on the date of the Order. A positive covenant with an easement could deal with an obligation to maintain and repair the site of the easement.

Conclusion

Cemetery operators planning to sell a cemetery for non-cemetery purposes and potential buyers of the land should seek legal advice in respect of potential ongoing liabilities on interment rights prior to selling or buying the land. Legal advice in respect of the easement and covenant as a condition of the contracts for sale should also be obtained.

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