

**NATIONAL COMPETITION POLICY
REVIEW OF THE CEMETERIES ACT 1958
(VICTORIA)**

BACKGROUND

The Victorian Government made a commitment to the Council of Australian Governments that Victorian legislation would be reviewed from a national competition policy perspective by the end of the year 2000. In accordance with that commitment this review examines the restrictions on competition in the Cemeteries Act 1958 (“the Act”).

NATIONAL COMPETITION POLICY

National competition policy requires the assessment of all legislative restrictions on competition and the removal of any unnecessary barriers to competition.

National competition policy in Australia had its origins in the work of a committee chaired by Professor Hillmer. That committee produced a report in 1993 known as the Hillmer Report. At page 1 of the Hillmer Report the benefits of competition are outlined as follows:

Competition provides the spur for businesses to improve their performance, develop new products and respond to changing circumstances. Competition offers the promise of lower prices and improved choice for consumers and greater efficiency, higher economic growth and increased employment opportunities for the economy as a whole.

The National Competition Policy Guidelines for Review of Legislative Restrictions on Competition (the “NCP Guidelines”) provide the framework for national competition policy reviews.

The NCP Guidelines suggest that open and unrestricted competition in markets is generally the most efficient means of allocating the community’s resources. At page 34 of the NCP Guidelines the effects of genuine competition are explained as follows:

Under conditions of genuine competition, producers will vie with each other for customers. Consumers are able to choose from among rival firms when purchasing the type and quality of goods and services they desire at the lowest possible price on offer ...the free operation of a competitive market will promote community welfare by simultaneously ensuring that:

- resources flow to the production of those goods and services for which customers are most willing to pay (allocative efficiency);
- best use is made of the community’s scarce resources by forcing out all but the most efficient/lowest cost suppliers of a given standard of good or service (technical efficiency); and
- technological innovation (or dynamic efficiency) is fostered as products vie for custom through the development of new or improved quality products.

The NCP Guidelines promote the minimisation of restrictions on competition and the limitation of restrictions to situations where the benefits of the restrictions to the community as a whole outweigh their costs. It is suggested in the NCP Guidelines that the benefits of the restrictions on competition will generally only outweigh their costs in situations of market failure.

The NCP Guidelines also recognise at page 34 that the effectiveness of the application of national competition policy to an individual market is dependent on the characteristics of that particular market and that:

open and unrestricted competition...does not always provide the best possible economic and social outcomes. Nor are the conditions always present for competition to thrive.

GUIDING PRINCIPLE FOR THE REVIEW

The guiding principle for this review is that legislation should not restrict competition unless it can be demonstrated that:

- The benefits of the restriction to the community as a whole outweigh the costs; and
- The objectives of the legislation can only be achieved by restricting competition.

CONDUCT OF THE REVIEW

It was originally anticipated that a new Cemeteries Act would be enacted by the end of the year 2000 and that national competition policy would be addressed as part of the preparation of the new Bill.

As a new Cemeteries Act is not currently anticipated until the year 2001 it was determined that a national competition policy review of the current Act would be undertaken.

The Act is a 1958 Act and as such is in need of extensive review. This review will only focus on the competitive restrictions in the Act. Other deficiencies in the Act will be considered in the ongoing broader review of the Act.

The review of the Act has been conducted by a review panel, which satisfies the necessary independence criteria. Information about the review panel is set out in Appendix 1.

The review has been conducted in accordance with the In House Review Model outlined in the NCP Guidelines.

The In House Review Model has no minimum consultation requirements. It was determined by the Department of Human Services that consultations would not be undertaken as part of the review.

Submissions to the Discussion Paper released in December 1996 titled "The Changing Role of Cemeteries" ("the Discussion Paper") have been taken into account as part of this review.

KEY REQUIREMENTS OF NCP REVIEWS

In accordance with the requirements of the NCP Guidelines this report will:

- Describe the burial and cremation market in Victoria;
- Clarify the objectives of the Act;
- Identify the restrictions on competition in the Act;
- Assess the costs and benefits of restrictions on competition in the Act;
- Identify and consider alternative means to deliver the objectives of the Act; and
- Make recommendations aimed at improving the legal framework for the provision of cemeteries and crematoria in Victoria.

REGULATION OF CEMETERIES AND CREMATORIA IN VICTORIA

The Act regulates the operation of cemeteries and crematoria in Victoria. It prescribes where bodies may be buried or cremated, who can administer cemeteries and crematoria, how cemetery trusts are to operate, the requirements for burial, cremation and exhumation and the approval and notification processes for cemetery and crematoria fees.

CEMETERY TRUSTS

The Act provides that Victorian cemeteries and crematoria are to be administered by cemetery trusts.

A cemetery trust is a body corporate with perpetual succession. The functions and powers of cemetery trusts are set out in the Act.

The Governor in Council appoints the members of cemetery trusts. The majority of cemetery trusts are composed of voluntary members who are generally drawn from the community where a cemetery is located. Approximately 75 cemetery trusts have their local government appointed as trustees.

Cemetery trusts are responsible for the day-to-day management and maintenance of cemeteries and crematoria.

PUBLIC CEMETERIES

There are 561 public cemeteries administered by 526 cemetery trusts in Victoria.

Public cemeteries in Victoria vary considerably in terms of their:

- Size;
- State of repair;
- Scale of operation; and
- Profitability.

PRIVATE CEMETERIES

There are also around 50 private cemeteries in Victoria. According to the Discussion Paper at page 30:

virtually all of which were established last century in association with religious groups. They operate by applying to the Secretary (to the Department of Human Services) for

written approval before each burial. This procedure is workable because of the small number of burials involved.

CLOSED CEMETERIES

There are also approximately 30 cemeteries in Victoria, which are not open to further internments. Closed or substantially closed cemeteries in Victoria include cemeteries located in Boroondara, Box Hill, Brighton, Burwood, Cheltenham, Coburg, Epping, Ferntree Gully, Footscray, Greensborough, Melbourne, Nillumbik, Northcote, Oakleigh, Queenstown, St Kilda, Templestowe, Pylong and Cassilis.

PIONEER MEMORIAL PARKS

The Act also provides a scheme for the conversion of cemeteries into “pioneer memorial parks”. A “pioneer memorial park” is defined in section 60A of the Act to mean a closed cemetery or part of a cemetery, which by removal of monuments, tombstones and other erections and grassing over of the area is converted to parkland.

The Act limits the cemeteries which can be converted to “pioneer memorial parks” to those cemeteries listed in the Fourth Schedule of the Act. The cemeteries listed in that Schedule are:

- Will Will Rook Public Cemetery;
- Old Seymour Public Cemetery;
- Oakleigh Public Cemetery;
- Coburg Public Cemetery; and
- Northcote Public Cemetery.

The cemeteries in that Schedule which have been converted to “pioneer memorial parks” are:

- Will Will Rook;
- Oakleigh; and
- Old Semour.

CREMATORIA

In Victoria crematoria can only be located within a public cemetery administered by a cemetery trust.

There are 9 crematoria operating in Victoria. They are located at:

- The Necropolis, Springvale;
- Fawkner Crematorium & Memorial Park;
- The Memorial Park, Altona North;
- Lilydale Memorial Park and Cemetery;
- Bunurong Memorial Park, Bangholme;
- Ballarat General Cemeteries & Crematorium;
- Neangar Memorial Park, Eaglehawk;
- Geelong Cemetery; and
- Traralgon Cemetery.

SCALE OF OPERATION OF CEMETERY TRUSTS

There is an enormous difference between the scale of operation of the cemetery trusts that have responsibility for the largest cemeteries (which include crematoria) and the cemetery trusts that have responsibility for the smaller cemeteries.

The biggest cemeteries in Victoria are The Necropolis and Faulkner Crematorium and Memorial Park.

The Discussion Paper stated at page 12 that:

In 1995 between them these two Trusts oversaw 47 per cent of all funerals and 74 per cent of all cremations statewide.

The 1999 Annual Report for The Necropolis stated that 5686 cremations and 2140 burials were conducted at The Necropolis during 1999.

The 1999 Annual Report for the Faulkner Crematorium and Memorial Park stated that the total of burials and cremations conducted for 1999 was 4612.

Both Annual Reports noted that their burial and cremation figures were down and stated that this reflected a continuing decline in the death rate in the community.

Whilst some of the larger cemeteries have huge turnovers and revenues some of the smaller cemeteries have limited or no income. The Discussion Paper stated at page 1 that:

300 Trusts are very small (that is in a year they take less than \$1000 in fees and have significantly less than \$5000 in the bank).

REGULATOR OF CEMETERIES AND CREMATORIA

In Victoria, the Department of Human Services regulates cemetery trusts.

OTHER LEGISLATION WHICH IMPACTS ON CEMETERIES AND CREMATORIA

Other legislation which impacts on the operation of cemeteries and crematoria, includes the:

- Accident Compensation (Work Cover Insurance) Act 1993 (which requires compulsory work cover insurance for employees);
- Births, Deaths and Marriages Registration Act 1996 (which requires registration of births, deaths and marriages);
- Coroners Act 1985 (which provides for inquests into suspicious deaths and gives the Coroner the power to order the exhumation of a body);
- Crown Land (Reserves) Act 1978 (which provides for the reservation of Crown land for purposes including the provision of cemeteries and crematoria);
- Dangerous Goods Act 1985 (which provides for the safe storage of herbicides and pesticides which may be used at cemeteries and crematoria);

- Environment Protection Act 1970 (which protects the environment and requires that discharges or emissions into the atmosphere, including emissions from crematoria, comply with the State's environment protection policy);
- Land Act 1958 (which provides for the sale of excess land including excess land held by cemeteries and crematoria);
- Flora and Fauna Guarantee Act 1988 (which provides for the conservation of protected species of flora and fauna);
- Fair Trading Act 1985 (which provides protection from misleading and deceptive conduct);
- Planning and Environment Act 1987 (which establishes a framework for planning requirements in respect of uses of land and development which effect the location of cemeteries and crematoria);
- Heritage Act 1995 (which provides for the protection of places and objects including monuments);
- Financial Management Act 1994 (which requires large cemetery trusts to present an annual report to Parliament);
- Occupational Health and Safety Act 1985 (which promotes the safety and welfare of employees);
- Public Records Act 1973 (which establishes a Public Records Office and a system of public records);
- Trade Practices Act 1974 (which provides for consumer protection and regulation of markets); and
- Trustee Act 1958 (which effects the investment powers of cemetery trusts).

FUNDING OF CEMETERIES AND CREMATORIA

The operation of public cemeteries and crematoria in Victoria is almost fully funded from the revenue generated by cemetery trusts. The Department of Human Services provides a cemetery maintenance grant fund which distributes grants totalling around \$30,000 per year.

DEFINITIONS IN THE ACT

The Act contains very few definitions. The term "cemetery" is not defined for the purposes of Part 1 of the Act (which deals with cemeteries). It is only defined in s62 in Part 2 of the Act (which deals with crematoria). A "cemetery" is only defined as a public cemetery. In s2A of the Act the term "vault" is defined to include a reference to a mausoleum. The term "bury" is defined to include a reference to the placing of a body in a mausoleum whether the body is placed below or above or partly below and partly above the ground. The terms "crematorium" or "crematoria" are defined in s62 of the Act as meaning any building or buildings fitted with appliances for the purpose of burning human remains and includes everything incidental or ancillary thereto.

RESTRICTIONS ON COMPETITION IN THE ACT

Restrictions On Entry Of Participants Into The Burial Or Cremation Market	
Section 3	Cemetery trusts to administer cemeteries
Section 44	Prohibition on the establishment of cemeteries or burial grounds save with the approval of the Governor in Council
Restrictions On Conduct Within The Burial Or Cremation Market	
Section 19	Prohibition on burial in a public cemetery without a permit
Section 21	Requirement that graves and vaults be watertight
Section 44	Provision for discontinuing a cemetery by order
Section 45	Prohibition on burial in a cemetery or burial ground, where there is an order that burial should be discontinued, unless a licence has been obtained
Section 46	Requirement of a licence to use a right of burial where there is an order that a burial in that cemetery should be discontinued
Section 47	Prohibition on burial in places other than cemeteries unless the approval of the Secretary to the Department of Human Services has been obtained
Section 48	Prohibition on exhumation of a body without a licence or in breach of a condition of an exhumation licence
Section 48	Requirement to pay a fee for an exhumation of licence
Section 51	Requirements in respect of registrations of burials
Section 60B	Proposal requirement for conversion of a cemetery to a pioneer memorial park
Section 60B	Limitation on the cemeteries, which can be converted to pioneer memorial parks
Restrictions On Fees Within The Burial Or Cremation Market	
Section 17	Requirement that fees for burials or inspection of records must be consented to by the Governor in Council and published in the Government Gazette
Section 17	Limitation on the fees that can be charged by cemetery trusts
Section 27A	Prohibition on the demand of fees, which are not authorised under the Act
Section 69	Requirement that fees for cremations and for the preservation or disposition of ashes of cremated bodies must be consented to by the Governor in Council and published in the Government Gazette

THE BURIAL AND CREMATION MARKET

THE GEOGRAPHICAL BOUNDARIES OF THE MARKET

The market regulated by the Act is the entire Victorian market for burials and cremations.

There may be a small demand for burials and cremations in Victoria from neighbouring border areas in South Australia and New South Wales.

THE DIMENSIONS OF THE MARKET

The Act does not regulate the entire chain of death services. Professions within the death care industry (such as funeral directors) are not regulated under the Act. The Act does however affect the entire chain of death services as the requirement that only cemetery trusts can operate cemeteries and crematoria prevents vertically integrated death care businesses from operating.

THE DIVERSITY OF THE MARKET

The market is divided between burials and cremations.

There is a diversity of products and services within the burial and cremation markets.

For burials the products include:

- Rights of burial;
- Earth or lawn graves;
- Grave liners;
- Vaults/Mausoleums;
- Tombstones or other monuments;
- Memorial trees or bushes; and
- Plaques.

Cemetery services include:

- Sinking graves;
- Interment of coffins;
- Re-opening graves;
- Use of a chapel;
- Maintenance of graves;
- Providing register extracts; and
- Exhumations.

For cremations the products include:

- Cremation urns;

- Niches for cremated remains;
- Rose bush memorials;
- Monuments;
- Plaques;
- Photos;
- Vases; and
- Other memorial options.

Cremation services include:

- Cremation of bodies;
- Use of a chapel;
- Interment of ashes; and
- Entries in books of remembrance.

STAKEHOLDERS IN THE MARKET

The stakeholders in the burial and cremation markets include:

- Cemetery trusts, members of cemetery trusts and their employees;
- Bereaved persons;
- Funeral directors and their employees;
- Stonemasons and their employees;
- Grave diggers;
- The Victorian Government;
- Local governments;
- The Coroner;
- The Returned Services League;
- The Australian Workers Union;
- Religious groups;
- Heritage organisations;
- Genealogical societies;
- Indigenous groups;
- Developers;
- Builders;
- Landscapers and gardeners;
- Florists;
- Coffin and casket producers; and
- All Victorians.

The multitude of stakeholders in the burial and cremation market, all with their own particular interests, means that there is no peak association that represents all participants in the burial and cremation market.

THE SIZE OF THE MARKET

The size of the burial and cremation market is essentially dependent on the number of deaths in Victoria.

According to the Australian Bureau of Statistics:

- there were 32,007 deaths in Victoria in 1998;
- the Australian average death rate in 1998 was 6.0 per thousand persons; and
- the Victorian average death rate in 1998 was slightly lower at 5.8 per thousand persons.

The size of the market is expected to increase as the population of Victoria ages and the size of the population of Victoria increases. According to Population Projections 1997 to 2051 Australian Bureau of Statistics 1998 at page 5 Victoria's population is projected to rise from 4.6 million in 1997 to between 4.7 million and 5.9 million in 2051.

Cremation is becoming more popular in Victoria but burials still hold a larger share of the market. In 1998 burials accounted for approximately 55% of the market and cremations approximately 45% of the market.

UNIQUENESS OF THE MARKET

The uniqueness of the burial and cremation market was recognised in the NCP Review of ACT Cemeteries and Crematoria Issues and Options Paper ("the ACT NCP Options Paper"), which stated that:

The decision making process involved in the purchase of cemetery or crematorium services is unique. This uniqueness is relevant to the policy discussion, as it may be that the regulations governing the purchase of other services are not appropriately applied to cemeteries and crematoria.

Decisions relating to these services are distinguished by:

- The infrequent nature of the transaction, leaving consumers with typically little knowledge about choices and prices;
- The fact that decisions are made at a time of emotional stress, perhaps involving reduced capacity to make rational decisions, and usually need to be made quickly;
- Decisions are often made by a family member or trustee; and
- The provisions of cemetery and cremation services have been highly regulated.

Jessica Mitford in her book "The American Way of Death Revisited" also highlights the uniqueness of the transaction to purchase burial or cremation products and services and illustrates this by referring to the disadvantage of a consumer purchasing death care services who is "anxious to get the whole thing over with...", who is in "almost total ignorance of what to expect", who feels required to make an on the spot decision and who is not likely to give the same time and attention to shopping around as with other products. She explained that this transaction differs from normal transactions as:

Impulse buying, which should be avoided in everyday life is here a built in necessity. The convenient equivocations of commerce "I'll look around a little and let you know" "Maybe I'll call you in a couple of weeks if I decide to take it" simply do not apply in this situation. Unlike most purchases this one cannot be returned in fifteen days and your money refunded in full if not completely satisfied.

The market for burial and cremation products and services also differs from other markets in a number of other respects.

THE IMPORTANCE OF LOCATION RATHER THAN PRICE

Location rather than price is likely to be a key factor in decision-making within the burial and cremation market. This was recognised in a 1992 Prices Surveillance Authority report on the funeral industry, which commented on the lack of price sensitivity in the funeral, burial and cremation industries.

The importance of location as a choice determinant is likely to be due to:

- The desire of bereaved persons to be able to visit loved ones throughout their lives; and
- The desire to be buried or interred at the same place as family members or loved ones.

Location appears to be a more important choice determinant in respect of cemeteries than crematoria. Russell Allison the Chief Executive Officer of The Necropolis was quoted in The Bayside Advertiser on 1 May 2000 as stating that:

Cremation itself is a very mobile process...Families from both sides of the Yarra use us.

The location of a crematorium is likely to be less important where cremated ashes are not intended to be interred at the crematorium.

Where cremated remains are to be interred at a crematorium the importance of location is likely to be equal for cemeteries and crematoria.

PROTECTION OF PUBLIC HEALTH

The market for burial and cremation products and services is not consumer driven to ensure that the disposal of the dead is done in a way that does not endanger the public health of Victorians. This is because public health and public safety concerns are generally not matters taken into account by persons arranging a burial or cremation.

There is however, a community expectation that cemeteries and crematoria will operate in a manner that does not cause a health risk.

RESPECT FOR THE DEAD

Respect for the dead is a universal human value. Our society expects and requires that human bodies will be disposed of in a dignified manner. Whilst our society supports free choice it also places limits on choices where those choices may be offensive to others. The dignity of deceased Victorians needs to be assured irrespective of whether their next of kin would be satisfied with undignified burial options (eg. mass graves).

ESSENTIAL SERVICE

Disposal of the dead is an essential service. Bodies must be disposed of in rural or outback areas irrespective of whether the population of the area is sufficient to make a cemetery or crematoria commercially viable.

COMMUNITY SERVICE ROLE

There is a community service role in the disposal of the dead. Arrangements need to be made for the disposal of the bodies of deceased persons whose estates cannot afford to pay for burial or cremation. Whether or not this role is commercially sustainable is irrelevant.

PRESERVATION OF PLACES AND RECORDS OF HISTORICAL AND SOCIAL SIGNIFICANCE

Cemeteries and areas where cremated remains are buried or interred may have historic or social significance to Victoria. Similarly, the records of burials and the records of interment of cremated remains may have historic or social significance to Victoria. The preservation of places and records of historical and social significance needs to occur whether or not it has economic value.

MARKET FAILURE

The market for burial and cremation products and services is an imperfect market because of the unique nature of the transaction to purchase burial or cremation products and services.

INFORMATION ASYMMETRIES

There are significant information asymmetries between providers of burial and cremation products and services and consumers in respect of:

- The law in respect of the burial or cremation of the dead;
- The processes for handling deceased persons;
- The natural decomposition of the human body after death;
- The range of burial and cremation services available and their costs; and
- The standards by which to evaluate the burial or cremation services which are available.

These information asymmetries are exacerbated by the vulnerability and disorientation of the person required to make the decision to purchase burial or cremation products or services and the speed by which decisions need to be made.

EXTERNALITIES

The burial and cremation market would not bear the costs of burials or cremations that are conducted in a manner which is detrimental to the public health of Victorians or which detrimentally effects the environment. These external costs would be borne by:

- Persons whose health was effected and their families;
- The health system;
- The welfare system;
- Taxpayers;
- The economy; and
- All Victorians.

If an infectious disease outbreak occurred because of poor burial or cremation practices the health of Victorians could be compromised and lives could be lost. There may also be the intangible external costs of pain, suffering, anxiety and bereavement.

An unregulated market may also involve other intangible external costs such as:

- The loss to Victoria of sites and records of historical or social significance;
- The loss to bereaved persons of burial or memorial sites of family or loved ones, which are sold and redeveloped; and
- Public outrage at disrespect for the dead.

AVAILABILITY OF OTHER LEGISLATION TO CORRECT MARKET FAILURES

The Trade Practices Act 1974(Cth) and the Fair Trading Act 1999 (Vic)

The Trade Practices Act 1974 (Cth) and the Fair Trading Act 1999 (Vic) both contain consumer protection provisions which can assist consumers of goods and services to take action in respect of misleading or deceptive practices.

Both Acts generally rely on the consumer to make a complaint. The user of burial or cremation services is the deceased who is not in a position to make a complaint. The person arranging the burial or cremation would only have redress under these Acts if conduct occurred or representations were made which objectively are judged to be misleading or deceptive.

These Acts would only be able to provide redress if matters addressed in the Act were the subject of discussions or representations prior to the purchase of burial or cremation products or services. Issues addressed in the Act are unlikely to be discussed in most burial or cremation transactions.

The Trade Practices Act 1974 (Cth) and the Fair Trading Act 1999 (Vic) provide useful remedies to consumers who have been misled or deceived. These Acts are designed to deal with situations which can be remedied by the repair or replacement of goods, the repair or replacement of services or monetary compensation. The protection offered by these Acts is reactive.

With burial and cremation products and services prevention is more important than redress. Once a person is cremated the cremation cannot be performed again. Exhuming and reburying a body is a very distressing occurrence for a family, which should only occur in exceptional circumstances. Monetary compensation is inadequate redress in such situations.

The consumer protection provisions of the Trade Practices Act 1974 (Cth) and the Fair Trading Act 1999 (Vic) are not sufficient to address the market failures in the cemetery and cremation market.

The Trade Practices Act 1974 and the Australian Competition and Consumer Commission also provide protection from market dominance, price fixing and other unfair and predatory practices. They have an important role to play in the death care market in conjunction with, rather than substitution for, the provisions of the Act.

It is important to appreciate that:

- The focus of the Trade Practices Act 1974 (Cth) and the focus of the Australian Competition and Consumer Commission are markets generally rather than the specific concerns in the burial and cremation market;
- With the exception of mergers and acquisitions they generally provide a reactive rather than preventative means to deal with some of the ills of unfair markets;
- They provide a means to deal with market dominance which arises through mergers of participants rather than market dominance that arises from natural attrition of participants who do not cope with increased competition;

- The avenues of redress which they provide are most often used by one participant in the market against another; and
- The avenues of redress they provide may be out of reach of individual consumers or members of the public because of the high costs of litigation.

Accordingly, the unfair market provisions of the Trade Practices Act 1974 (Cth) and the operation of the Australian Competition and Consumer Commission are not sufficient to address the market failures in the burial and cremation market.

The Health Act 1958 (Vic)

The Health Act 1958 (Vic) (the “Health Act”) is one of the primary Acts that protects public health in Victoria. It regulates numerous public health issues such as nuisances, protection of water supplies, radiation safety, pest control, immunisation, drugs and injurious substances and the management and control of infectious diseases.

The provisions in the Health Act do not specifically deal with public health issues in relation to cemeteries or crematoria.

Some of the provisions of the Act could however, be used to deal with some of the public health issues in relation to cemeteries and crematoria. One of the public health concerns in relation to cemeteries is seepage from graves into water catchments. This could be dealt with under section 81 of the Health Act, which gives the Governor in Council the power to make regulations protecting water supply systems and catchments from contamination.

The provisions of the Health Act in respect of nuisances could also be used to deal with public health concerns in respect of noxious emissions from graves. “Nuisances” are defined in section 39A of the Health Act as:

“nuisances which are, or are liable to be, dangerous to health or offensive and in particular to nuisances arising from or constituted by-

- a) Any building or structure; or
- b) Any land, water or land covered by water; or
- c) Any animal, bird or pest animal within the meaning of section 108A; or
- d) Any refuse; or
- e) Any noise or emission; or
- f) Any state, condition or activity; or
- g) Any other matter or thing-

which is, or is liable to be, dangerous to health or offensive.

The provisions in the Health Act that have the potential to be used to regulate the cemeteries and cremation market are limited in number and application. They are general provisions that do not obviate the need for specific provisions to deal with specific regulatory concerns in the burial and cremation market.

By way of illustration whilst nuisance provisions have the potential to be used for noxious emissions from graves or mausoleums, the provision in the Act have the advantage that they specifically provide that the relevant grave or vault may be re-opened for examination. With the increasing popularity of mausoleums noxious smells will continue to be an issue for cemeteries that requires a specific head of power to remedy.

Whilst it would be possible to include specific provisions to regulate cemeteries and crematoria in the Health Act separate regulation of cemeteries and crematoria in the one specific piece of legislation has a number of advantages. It makes the regulation of cemeteries and crematoria;

- More prominent;
- Easier for participants in the burial and cremation markets to have access to and comply with; and
- More accessible to the public.

The Act also includes provisions that have nothing to do with public health and which really do not belong in the Health Act such as provisions about:

- Rights of burial;
- Tenure of graves; and
- Maintenance of closed cemeteries.

The current provisions of the Health Act are not sufficient to correct market failures in the cemeteries and cremation market.

THE COMMON LAW

The common law of Negligence may provide a remedy in some circumstances for defective burial or cremation products or services. If a monument collapsed and a mourner standing nearby was injured, compensation may be payable. There needs to be a duty of care to the person hurt, a breach of that duty, injury or other damage which is foreseeable and an unbroken chain of causation for compensation to be payable.

An action in Negligence is an avenue of redress that is reactive rather than preventative. It is only available in limited circumstances and requires the person concerned to have the financial means to take litigation. The reactive nature of Negligence and its limited application to cemeteries and crematoria make the common law an insufficient remedy to correct market failures in the burial and cremation market.

OBJECTIVES OF THE LEGISLATION

There is no statement of objectives in the Act. Including objectives in an Act is a modern drafting style that was not in vogue at the time the Act was enacted.

The objectives of the Act are also not apparent from an examination of the parliamentary debates.

Accordingly, the objectives of the Act need to be gleaned from the provisions themselves.

From an examination of the provisions of the Act it appears that the objectives of the Act include ensuring the following:

- The provision of a high quality system of cemeteries and crematoria in Victoria;
- The protection of public health;
- The maintenance of public decency;
- Perpetual tenure of graves, vaults, tombstones and other memorials;
- Ongoing maintenance of graves, vaults, tombstones and other memorials;
- Preservation of cemeteries and crematoria and their records;
- Community safety;
- The free exercise of religious or cultural funeral rites;
- That bodies will not be disposed of or exhumed to avoid the criminal law;
- That bodies will be available for investigation by the Coroner;
- That there be provision for burial of poor persons;
- That fees for burial and cremation products and services will be reasonable;
- That fees for burial and cremation products and services will be accessible;
- That the operation of cemeteries and crematoria in Victoria will not be a substantial drain on the public purse.

There is no provision requiring cemeteries and crematoria to be run as not for profit entities. This is not an objective of the Act but it is an expectation implicit in the:

- System of cross subsidisation of cemeteries;
- Obligations in respect of burials of poor persons; and the
- Financial reporting requirements of cemetery trusts.

THE LEGISLATIVE FRAMEWORK

The principal elements of the regulation of cemeteries and crematoria in the Act are that:

- Bodies must generally be buried in a public cemetery or cremated in a public crematoria;
- Owners of graves, vaults, monuments, tombstones and other memorials are generally to have the right to their use for ever;
- Rights of burial which are not exercised may be cancelled after 25 years;
- Reuse of graves by family members is permitted;
- Private commercial cemeteries and crematoria cannot be set up in Victoria;
- The governing bodies of cemeteries and crematoria have perpetual succession as they are run by trusts rather than individuals;
- Individuals can not exercise controlling power over cemetery trusts;
- Cemetery trusts have an obligation to provide for the burial of poor persons;
- Cemetery trusts are required to report their revenues and expenditures and be accountable;
- Cemetery trusts that administer more than one cemetery can administer all cemeteries as if they were one cemetery and can use the property, funds and income of any cemetery administered by the cemetery trust to develop, preserve or maintain any other cemetery that the cemetery trust is administering;
- Fees for burial and cremation require the approval of the Governor in Council and must be published in the Government Gazette;
- Records of burial and cremation are to be kept to facilitate public access and record searches; and
- Burials, cremations and exhumations are only to be conducted if prescribed permit/permission/ warrant processes have been followed.

WHY SHOULD CEMETRIES AND CREMATORIA BE REGULATED?

PROTECTION OF PUBLIC HEALTH

The regulation of cemeteries in Victoria began in 1865 when the Public Health Act was passed. At that time it was believed that infectious diseases were spread through the dissipation of miasma, dangerous and noxious gases that rose through the soil from decomposing bodies.

Cemeteries were once a breeding ground for infectious diseases such as typhoid, cholera, plague and intestinal infections.

The Encyclopaedia Britannica 1936 noted that in the mid 19th century public attention was repeatedly drawn to the insanitary condition of London's churchyards.

The vaults under the pavements of the churches, and the open ground surrounding them, were crammed with coffins. Coffins were placed tier above tier in the graves until they were only just below the surface. To make room for fresh internments the sextons had recourse to the surreptitious removal of bones and partially decayed remains. The neighbourhood of the churchyard was usually unhealthy.

A Brief History of Cemeteries noted that:

historically graveyards were often littered with bones ...Shallow graves allowed maggots and scavengers to dig up and scatter the remains along with any contagion they might also carry.

Historical concerns with cemeteries included:

- The spread of infectious diseases;
- The sale of the same grave several times;
- Grave robbing; and
- Body snatching of corpses.

The following poor contemporary burial and cremation practices recently uncovered by the Department of Consumer Affairs in California illustrate that public health concerns are not purely historical concerns of the past:

- The discovery of human bone fragments and casket pieces scattered in several locations in cemeteries;
- The discovery of decomposed bodies intended to be cremated;
- The discovery of unrefrigerated and unembalmed bodies which were to be cremated; and
- The discovery of human bodies abandoned in corpse transport vans.

Regulation of cemeteries and crematoria in Victoria has been successful in ensuring that the spread of infectious diseases from cemeteries and crematoria is no longer a significant public health concern.

The fact that there is no significant public health concern in relation to cemeteries and crematoria currently in Victoria does not mean that continued regulation is unnecessary.

Regulation continues to be necessary to ensure that cemeteries and crematoria continue to pose no significant public health concerns for Victoria.

PUBLIC DIGNITY AND OTHER COMMUNITY VALUES

A submission to the Cemeteries Act Review discussed the fact that respect for the dead and dignified dealings with bodies is a universal human value. The submission stated:

Respect for the dead, their resting place, remains, records and memorials, dignity in their treatment, a feeling of ownership of remains and memorials, accessibility, affordability, continuity and a sense of sanctity are shared community values. They are shared across denominations, across religions, across ethnic groups and by the great majority of those who feel no special religious or ethnic affiliation. Respect for the dead goes hand in hand with respect for life itself.

The following poor contemporary burial and cremation practices recently discovered by the Departments of Consumer Affairs in California illustrate that disrespect for the dead continues to be a concern in modern times:

- The conversion of single burial graves to multiple burial graves;
- The disturbing of interred remains;
- The sale of cemetery plots when all interment rights had been sold;
- The discovery at an airport storage facility of the cremated remains of thousands of people which were supposed to have been scattered;
- The delivery of the wrong cremated remains to families;
- The failure to identify bodies intended for cremation; and
- The failure to keep logs of cremations.

The extent of indignity which has occurred is conveyed in the Commentary of Jess Marlow on the Channel 4 News on August 22 1995.

In the latest case, families found headstones of their relatives tossed in a trash dumpster. A class action suit filed today in the case of... "Paradise Park" in Sante Fe Springs charges mock burials were conducted, bodies removed from caskets, the caskets resold, the bodies piled like cord-wood and tossed into mass graves... This follows on the heels of years of investigation and criminal proceedings involving a Pasadena funeral home whose operators conducted mass cremations, co-mingled ashes, removed organs for medical research without family approval, even extracted gold-filled teeth from corpses.

Regulation is necessary to ensure that participants in the burial and cremation market treat human remains respectfully.

PRESERVATION OF CEMETERIES AND CREMATORIA

There is also a need to regulate cemeteries and crematoria to ensure that graves, vaults, tombstones, plaques and other memorials and the records relating to them which have historical and social significance are maintained for future generations.

The website of the organisation Saving Graves states the following:

Today, all across the world, thousands of small cemeteries on private property are in danger of being bulldozed off, and the land used for crops, grazing or new development. Left unprotected, many cemeteries fall prey to real estate developers or others who are seeking short-term economic or personal goals. These unfeeling people destroy many of these old cemeteries. Showing no respect for the dead or their families. They do not appreciate or understand the importance of human burial sites as visible tangible links to the people who made our history. The inscriptions on their monuments tell us not only their names and their dates, but often where they lived, their occupations and affiliations, the manner of their death, personal traits that survivors held dear, and names of relatives. These inscriptions provide us with invaluable data regarding local, medical, and material history, cultural geography, historical archaeology, folklore, and genealogy and much more. Data that in many cases may be found nowhere else.

Cemeteries are a part of a locality's history and are a local tourist attraction.

An article in the Port Phillip/Caulfield Leader dated 27 November 2000 states that tours of the St Kilda Cemetery are conducted several times a year. It explains the interest in cemetery tours as follows:

...if you know where to look, the old weathered stones have tales to tell. Stories that are part of the St Kilda district's history, stories of remarkable lives, deaths, unsolved mysteries and tragedies.

COMMUNITY SAFETY

Regulation is necessary to ensure that the public is not put at risk when visiting a cemetery or crematorium due to unsafe graves, monuments, mausoleums, memorials or other erections which have been damaged by the elements or by vandals or which have decayed over time.

In 1999, consultants appointed by the previous government estimated that there were 153,000 damaged graves in Victoria. The number of damaged graves that are unsafe is not known.

Whilst compensation for any injury sustained by a member of the public may be payable under the common law of Negligence prevention of harm is preferable to compensation.

Threat of legal action may not be as effective in ensuring a reasonable state of repair, as it is in other markets, as repair of monuments is the responsibility of the person holding the right of burial.

The cemeteries where there is likely to be the greatest risk to public safety are the older cemeteries whose graves, monuments and other memorials have decayed over time. Descendants of persons who died 100 or more years ago may be unknown, unable to be

located, or unable or unwilling to pay for repairs to graves, monuments or memorials to their ancestors.

Regulation provides a means to require a person holding a right of burial to remove dangers or make necessary repairs or restorations of monuments or other erections in a cemetery to prevent risks to public safety. Where this process is unsuccessful, it also provides a process for dangerous monuments or other erections to be repaired or removed.

RELIGIOUS AND CULTURALLY APPROPRIATE SERVICES

Regulation is necessary to guarantee the free exercise of religious and culturally appropriate death rites.

Our society values religious freedom. The expression of this freedom requires the right to choose whether to have religious rites as part of a burial or cremation. Similarly, the multicultural nature of Victoria means that persons of different ethnic origins or indigenous persons should have the right to have culturally appropriate rites as part of a burial or cremation. Religious or culturally appropriate funeral rites and services must not be hindered or interfered with at cemeteries and crematoria. This needs to be guaranteed whether or not it would be available within the market.

PREVENTION OF DISPOSAL OF THE DEAD TO EVADE THE CRIMINAL LAW

Regulation is also necessary to serve the interests of justice.

In order for the rule of law in a civilised society to protect its citizens from violence there needs to be investigations of deaths that occur in suspicious or criminal circumstances. The criminal element needs to be prevented from cremating a body or burying or exhuming it to prevent an autopsy or to prevent other investigations, which the police or the Coroner may require. Exhumations need to be provided for to ensure that the cause of death of a person who died in suspicious circumstances can be verified.

The interests of justice are too important to be left to market forces.

FEES

Regulation is also necessary to ensure that burial and cremation fees are reasonable and are accessible to the public. Providers of burial and cremation products and services can not be permitted to set their fees at a level that only caters for the top end of the market and is out of reach of the majority of Victorians.

SUPPORT FOR CONTINUED REGULATION

Submissions received in response to the Discussion Paper released in 1996 strongly supported the continuation of the regulation of cemeteries and crematoria in Victoria.

RESTRICTIONS ON COMPETITION

The restrictions on competition in the Act fall within the following categories:

- Restrictions on entry into the burial and cremation market;
- Restrictions on conduct within the burial and cremation market; and
- Restrictions on fees which can be charged by cemeteries and crematoria

RESTRICTIONS ON ENTRY INTO THE BURIAL AND CREMATION MARKET

The restrictions on the entry of participants into the burial or cremation market are:

- The creation of cemetery trusts to administer cemeteries in Victoria (section 3); and
- The prohibition on the establishment of cemeteries or burial grounds in Victoria save with the approval of the Governor in Council (section 44).

Restrictions on Cemetery Provision

The Act does not explicitly prohibit the establishment of private commercial cemeteries. This is however the effect of the provisions of the Act that set up cemetery trusts as the entities that are to administer cemeteries in Victoria.

Whilst the Governor in Council may have the power to approve the establishment of a private commercial cemetery under section 44 of the Act this would be contrary to the framework and spirit of the Act.

Similarly, the Act does not expressly prohibit vertical integration. The provisions of the Act that set up cemetery trusts as the entities that are to administer cemeteries and crematoria in Victoria, also have the effect of preventing vertical integration.

Restrictions on Crematoria Provision

There is also no explicit prohibition in the Act on private crematoria. The sections of Part II of the Act which deal with cremations implicitly prohibit private crematoria as the provisions only give powers, functions and obligations in respect of cremations to cemetery trusts.

RESTRICTIONS ON CONDUCT WITHIN THE BURIAL AND CREMATION MARKET

The restrictions in the Act on the manner in which burials, cremations and exhumations are conducted are as follows:

Restrictions on the Conduct of Cemeteries

- Prohibition on burial in a public cemetery without a permit (section 19).
- Requirement that graves and vaults must be watertight (section 21).
- Provision for discontinuing a cemetery by order (section 44).
- Prohibition on burial in a cemetery or burial ground, where there is an order that burial should be discontinued, unless a licence has been obtained (section 45).
- Requirement of a licence to use a right of burial where there is an order that burial in that cemetery should be discontinued (section 46).
- Prohibition on burial in places other than cemeteries unless the approval of the Secretary to the Department of Human Services has been obtained (section 47).
- Prohibition on exhumation of a body without a licence or in breach of a condition of an exhumation licence (section 48).
- Requirement to pay a fee for an exhumation licence (section 48).
- Requirements in respect of registration of burials (section 51).
- Proposal requirement for conversion of a cemetery to a pioneer memorial park (section 60B).
- Limitation on the cemeteries that can be converted to pioneer memorial parks (section 60B).

Restrictions on the Conduct of Crematoria

- Limitation on the sites that can be used for a crematorium (section 66).
- Provision for discontinuing cremations by order (section 70).
- Requirements in respect of registration of cremations (section 73).
- Prohibition on cremation without permission to cremate (section 76).
- Procedures for consent to a cremation (section 77).
- Prohibition on cremation outside a cemetery except with the consent of the Secretary to the Department of Human Services (section 79).

RESTRICTIONS ON FEES WITHIN THE BURIAL AND CREMATION MARKET

The restrictions on fees within the burial and cremation market are as follows:

Restrictions on Fees of Cemeteries

- Requirement that fees for burials or inspection of records must be consented to by the Governor in Council and published in the Government Gazette (section 17).
- Limitation on the fees that can be charged by cemetery trusts (section 17).
- Prohibition on the demand of fees that are not authorised under the Act (section 27A).

Restrictions on Fees of Crematoria

- Requirement that fees for cremations and for the preservation or disposition of the ashes of cremated bodies must be consented to by the Governor in Council and published in the Government Gazette (section 69).
- Prohibition on the demand of fees that are not authorised under the Act (section 27A).

OTHER MATTERS WHICH EFFECT COSTS WITHIN THE BURIAL AND CREMATION MARKET

In order to assess the restrictions on competition in the Act it is important to be aware of two matters perpetuated by the Act that affect costs within the burial and cremation market. These matters are perpetual tenure and cross subsidisation. These concepts are entwined in the Act and significantly effect the provision of burial and cremation products and services in Victoria.

PERPETUAL TENURE

Section 25(1) of the Act provides that:

Any person digging or making any vault grave or tombstone or erecting or placing any monument in any such cemetery by and with such permission as aforesaid and upon payment of the fees aforesaid shall save as otherwise expressly provided in this Act be entitled to have maintained and kept up such vault grave monument or tombstone according to the terms of such permission to and for the sole and separate use of such person and his representatives for ever.

This section of the Act provides a right to perpetual tenure for graves, vaults, tombstones and monuments in Victoria subject to the terms if any, of the permission from the relevant cemetery trust. It also allows for reuse of vaults and graves by the holder of the right of burial.

The grant of permanent tenure for graves in Victoria creates an ongoing liability for the maintenance of an enormous number of graves in Victoria (which are not otherwise cared for) including graves in closed cemeteries.

This ongoing liability does not extend to maintenance of all graves in Victoria. Pursuant to section 23 of the Act the person who has the exclusive right of burial in a grave or vault is responsible for its maintenance in a state unlikely to cause danger to life or limb and in thorough repair and in proper condition.

Ongoing liability for the maintenance of graves in Victoria arises in respect of graves where the person who has the exclusive right of burial is not:

- Known; or
- Able to be located.

The extent of this liability is unclear. In 1997 there were approximately 2.5 million bodies interred in Victoria. The number of graves where the person who has the exclusive right of burial is not known, or is unable to be located has not been calculated.

According to the ACT NCP Options Paper at page 16 the expected outcomes of permanent tenure include:

- At some point an active cemetery will allocate all available land;
- When land becomes a constraint, revenues from new interment fall;
- With greater use of the cemetery, maintenance expenditures over existing graves rise - especially those with older style monumental areas which tend to attract vandals;
- The government might eventually be required to provide funding for ongoing maintenance, or charges for interments would increase.

The Act distinguishes between cremated remains and the remains of a body (“human remains”). The Act regulates what can be done with human remains after burial (section 48) and specifically provides perpetual tenure for interred human remains.

In contrast, the Act is silent on what can be done with cremated remains. As a result crematoria in Victoria offer both perpetual and limited tenure for interred cremated remains.

POSITION ON TENURE IN VICTORIA

Submissions in response to the Discussion Paper strongly supported the view that land in which human remains had been interred is sacred and that there should be permanent tenure for interred human remains.

The position of the Bracks government on tenure is unclear.

Labour’s election policies were silent on the issue of tenure for interred human remains.

On 24 May 2000 Minister Campbell the Minister for Community Services told Parliament that the Bracks government considers cemeteries as sacred sites. This was said in the context of a statement that cemeteries are not for sale under the Bracks government. The issue of tenure was not addressed.

ALTERNATIVES TO PERPETUAL TENURE

Position on Tenure in other States and Territories

Perpetual tenure for interred human remains is not universally available throughout Australia.

South Australia and Western Australia have different limited tenure models.

In South Australia different lengths of tenure are available in different cemeteries and within cemeteries. Tenure of 25 years, 50 years, 99 years and permanent tenure are all available. Different fees are payable dependent on the length of tenure required.

In Western Australia the Cemeteries Act 1986 specifies tenure of 25 years.

Tenure can be extended on payment of a fee in both South Australia and Western Australia.

In New South Wales and the ACT there is perpetual tenure.

The National Competition Policy Review of ACT Cemeteries and Crematoria (“the ACT NCP Report”) at page 53 sets out the benefits of limited tenure options as follows:

The benefit of offering a range of tenure options would be that it would contribute to the sustainability of cemeteries in terms of land use and maintenance costs...The benefits would also include clearer signals to users – those people who wish to have “in perpetuity” would pay a higher price that reflects the maintenance costs and the opportunity cost of land.

The ACT NCP Report recommended that cemetery operators should be allowed to offer gravesites of different tenure including perpetual tenure.

On 13 July 2000, when the ACT Minister for Urban Services Brendan Smyth MLA released the ACT NCP Report and announced the ACT Government’s response he indicated that the ACT Government did not accept the report’s recommendation to limit post burial tenure at public cemeteries.

It is beyond the scope of this review to consider tenure alternatives and to recommend whether perpetual tenure should be retained in Victoria.

RECOMMENDATIONS

- That the position of the Victorian Government on tenure be clarified.
- That the Act recognise the special nature of land in which human remains are interred.
- That cremated remains that are interred be given the same tenure in the Act as human remains.
- That reuse of vaults and graves by the holder of the right of burial be retained in the Act in order to reduce the number of graves in Victoria, the cost of their maintenance and burial costs to the holder of the right of burial.

CROSS SUBSIDISATION

Historically, provision has not been made for the cost of the perpetual care of graves. Sufficient financial reserves have not been built up to provide for the long-term maintenance of cemeteries.

According to a submission to the Cemeteries Act review Victoria the failure to build up adequate reserves to maintain cemeteries is not particular to Victoria. The submission from Heritage Victoria referred to a similar historical situation in England and stated at page 3 that:

Large nineteenth century cemeteries such as Highgate, Kensal Green, Nunhead, Brompton and Norwood were all originally established by public companies which guaranteed their clients eternal rest in an Elysian landscape to be tended and maintained in perpetuity.

Most of these public companies, despite their guarantees, also failed to build up sufficient reserves resulting in declining maintenance standards as the cemeteries filled.

With the exception of Kensal Green cemetery (which was able in the 20th century to derive income from a crematorium), the maintenance of these very significant cemeteries befell on others, usually local government.

The annual cost of maintaining a grave varies from cemetery to cemetery and also varies within cemeteries between monumental areas and lawn areas. In 1997 Memorial Park in Altona gave an estimate of its maintenance costs for a lawn grave as \$10.61 per grave per annum. In 1997 the estimate of the annual maintenance costs of Templestowe cemetery, which contains both lawn and monumental areas, was \$45 per grave.

As cemetery trusts are not responsible for the maintenance of individual memorials the cost of perpetual maintenance has not been factored into the price of burial products and services in Victoria, except in respect of recent mausoleum developments. If these costs were factored into burial prices there would need to be substantial increases in burial prices charged in Victoria.

There is also no statewide government or industry trust fund with responsibility for perpetual care of graves in Victoria or which supports cemeteries in Victoria that are not economically viable. There are a significant number of cemeteries in Victoria that are not economically viable. In 1998 there were 133 cemetery trusts in Victoria that made losses.

In Victoria, cemeteries that are not economically viable are able to survive by being subsidised by other cemeteries administered by the same cemetery trust.

Cross subsidisation has been fostered under the Act pursuant to section 5(2) of the Act which allows cemetery trusts which have responsibility for more than one cemetery to administer all cemeteries as if they were one cemetery and to use the property, funds and income of any cemetery that the cemetery trust is administering (which may include income from a crematoria) to develop, preserve or maintain any other cemetery that it is administering.

One example of cross subsidisation pursuant to the Act is The Necropolis. Under sections 85A and 85B of the Act The Necropolis was given responsibility for St Kilda Public Cemetery and Melbourne General Cemetery.

Cross subsidisation is also fostered under the Act through the making of regulations pursuant to section 3(1)(e) of the Act, which provides that:

The Governor in Council may make regulations-

Abolishing any cemetery trust and transferring all its assets and liabilities to another cemetery trust or to another person or body (including the State of Victoria)

In the context of the administration of cemeteries and crematoria cross subsidisation has the advantages that it:

- Reduces the financial risk of any individual cemetery;
- Allows commercially unviable rural and remote cemeteries to operate;
- Provides funds for some ongoing maintenance where there is insufficient funds to sustain it;
- Ensures the survival of closed or partially closed cemeteries; and

- Saves the Victorian public purse from having to foot the bill for the costs that are cross subsidised.

Cross subsidisation is one of the ills that national competition policy, with its emphasis on improved productivity, enhanced competition and level playing fields, is aimed at rectifying. It promotes an inefficient market by:

- Reducing incentives for individual cemeteries to manage their own level of risk;
- Reducing incentives for individual cemeteries to become more efficient;
- Reducing incentives for cemeteries and crematoria achieving surpluses to develop their markets;
- Allowing prices to be set which do not promote full cost recovery;
- Accumulating ongoing liabilities rather than finding solutions to them; and
- Promoting an unlevel playing field.

Victorian Government policy generally supports the removal of cross subsidisation. The Guidelines for Setting Fees and Charges Imposed By Departments and Budget Sector Agencies 2000-2001 put out by the Department of Treasury and Finance at page 6 states:

Where there is a group of products or services provided to which a range of fees or charges apply, cross subsidisation between different classes of users should, as far as possible be avoided.

ALTERNATIVES TO CROSS SUBSIDISATION

In the Discussion Paper the options to replace cross subsidisation raised for comment were:

- The establishment of a perpetual care fund in which levies (calculated as a percentage of the cost of each interment or memorial) are invested and the interest earned on the fund made available for ongoing maintenance;
- Requiring compulsory insurance of monuments for all future interments;
- Limited tenure to allow cemeteries to return to being active after a period of time;
- Reuse of graves by family members;
- The sale of closed cemeteries; and
- Allowing closed cemeteries to return to nature.

It is beyond the scope of this review to identify and explore all the alternatives to cross subsidisation of cemeteries and crematoria and to recommend a suitable replacement for cross subsidisation of cemeteries and crematoria.

RECOMMENDATIONS

- That replacement of the cross subsidisation of cemeteries and crematoria be adopted as a long-term objective.
- That alternative funding sources for maintenance costs and for the propping up of economically unviable cemeteries be investigated.
- That the Act be amended to allow both burial and cremation of poor and destitute persons in order to lower the costs to government of the provision of this community service.

ASSESSMENT OF THE RESTRICTIONS ON ENTRY INTO THE BURIAL AND CREMATION MARKET

LINKS BETWEEN THE OBJECTIVES OF THE ACT AND THE RESTRICTIONS ON ENTRY INTO THE BURIAL AND CREMATION MARKET

The Act aims to deliver high standards of cemetery and crematorium operation in terms of public health, public dignity, perpetual care, preservation of sites and records of historical and social significance, respect for the law, religious and cultural tolerance and consumer protection through maintaining cemeteries and crematoria in public rather than private ownership.

There appears to be a number of assumptions underlying the Act about the best means to deliver the objectives of the Act.

First, there appears to be the assumption that by restricting the operation of cemeteries and crematoria to cemetery trusts and thereby eliminating the profit driver, it is more likely that cemeteries will be run for the benefit of Victoria and local communities rather than for the benefit of private shareholders.

Second, there appears to be the assumption that using cemetery trusts as management structures for cemeteries and crematoria is the best means to administer cemeteries and crematoria in Victoria without being a drain on the public purse.

Third, there appears to be the assumption that the appointment of local volunteer trust members to run cemeteries and crematoria in Victoria is likely to provide cemeteries and crematoria with managers of a high ethical standard and high calibre who are representative of the community.

Fourth, there is the assumption that by restricting the ability of individuals to control cemeteries and crematoria it is more likely that the criminal element will be kept out of the management of cemeteries and crematoria.

BENEFITS OF THE RESTRICTIONS ON ENTRY INTO THE BURIAL AND CREMATION MARKET

The ACT NCP Options Paper sets out the potential benefits of the administration of cemeteries by cemetery trusts as:

- An appropriate level of probity in the management of cemeteries;
- An adequate supply to all people of cemetery services at affordable prices; and
- The proper maintenance of cemeteries including the guaranteed treatment of the remains of the dead in a dignified manner.

Other benefits of the restrictions on the entry of participants into the burial and cremation market would include that cemetery trusts:

- Have demonstrated experience in the management of cemeteries and crematoria in Victoria and have a proven record of success in the administration of cemeteries and crematoria;
- Are perpetual structures which are not dependent on the financial viability or longevity of a private business;
- Can take public health, public dignity and public good matters into account without being solely driven by the bottom line, accountability to shareholders and the need to declare dividends;
- Can ensure ongoing public access to cemeteries and crematoria memorial sites and their records;
- Can provide goods and services in the burial and cremation market where the operation of a cemetery or crematorium is not commercially viable;
- Can provide community services such as burial of poor and destitute persons;
- Can provide for perpetual maintenance of graves via subsidisation from the surpluses of other cemeteries and crematoria administered by that cemetery trust rather than being a drain on the public purse;
- Can allow community participation, representation and accountability;
- Can keep prices down because of cost savings that can be made from the use of volunteered labour and the fact that there is no imperative to provide dividends to shareholders; and
- Can ensure that religious or culturally appropriate death rites are not interfered with as cemeteries and crematoria are public rather than private property.

There is also the benefit of the prevention of the concerns that arise when vertical integration of an industry is permitted.

COSTS OF THE RESTRICTIONS ON ENTRY INTO THE BURIAL AND CREMATION MARKET

The restrictions on the entry of participants into the burial and cremation market may result in costs such as:

- A reduced number of cemeteries and crematoria for consumers to choose from;
- A reduced range of burial and cremation products and services being available;

- Concentration on core service provision rather than provision of additional services such as counselling and insurance;
- Less emphasis on marketing and a corresponding lower awareness in the community of the products and services which are available;
- Reduced entry of new products into the market because of less money being available for product development;
- Reliance on cemetery trusts' perception of local views rather than on market research;
- Reduced opportunities for efficiencies in administration;
- Reduced managerial, accounting and business skills and experience of those running cemeteries and crematoria who may be appointed on the basis of their representation of a sector of the community or because of their willingness to be appointed rather than their suitability;
- Reduced capacity of those managing cemeteries and crematoria in an honorary capacity to devote further time to work that it is required or to undertake retraining; and
- Lost opportunities for overhead minimisation and one stop shopping which may be available if vertical integration was permitted.

COSTS V. BENEFITS OF THE RESTRICTIONS ON ENTRY INTO THE BURIAL AND CREMATION MARKET

THE CURRENT SYSTEM

The Discussion Paper acknowledged that the current system of administration of cemeteries and crematoria by cemetery trusts had served Victoria well.

This was also recognised in submissions to the Cemeteries Act review.

One of the submissions to the Cemeteries Act review stated that:

In our view it is undeniable that the present system, under which the cemetery/crematoria industry (and by association, the funeral industry) has operated for the past 140 years, has served the community well.

However, it also needs to be acknowledged that there is a large divergence in the efficiency, administration capability and professionalism of cemetery trusts.

IMPACT ON THE NUMBER OF CEMETERIES AND CREMATORIA

Allowing private operators into the burial and cremation market is not likely to result in a significant change in the number of cemeteries and crematoria in Victoria.

The population in Victoria and the death rate is not sufficient to sustain significant growth in the numbers of cemeteries and crematoria. There are also considerable non-legislative barriers to entry into the burial and cremation market.

These barriers to entry into the burial and cremation market include:

- The cost of setting up a cemetery or crematoria;

- The long lead times before initial outlays are recovered;
- The scarcity of appropriate land;
- The fact that demand in outer suburbs where large tracts of land may be available is likely to be low because outer suburbs are often inhabited by young families;
- Planning laws;
- The objections of potential neighbours who take the “not in my backyard” attitude;
- The family and other connections of potential consumers to existing facilities; and
- The goodwill of existing facilities within a community.

Professor Ronald G E Smith explains the practical barriers to entry into the burial and cremation market in his submission (on behalf of the International Cemetery and Funeral Association) to the United States Federal Trade Commission’s Funeral Rule Review. In his submission he notes that:

For both the funeral and cemetery industry the financial barriers to entry have been high because of the large investment of funds required to finance the construction of a new funeral home or cemetery and to operate it until it reaches the break-even point. For cemeteries there is the further difficulty arising from the scarcity in many populated areas of suitable tracts of available land on which to develop a cemetery. For both types of facilities the start-up period is typically lengthy because of the importance to consumers of the reputation and goodwill (heritage) of an establishment, which often takes years to acquire.

Crematoria Set Up Costs

In the ACT NCP Report it was stated at page 13 that:

The establishment costs for crematoria vary depending on the quality and type of facility (slow or fast burning with the former representing a cheaper option and the latter a more environmentally attractive one). The Cemeteries and Crematorium Association suggested to the review that the breakeven point for the cheaper slow burning crematoriums is around 100-150 per year compared with 400 per year for the fast burning facilities.

It appears from the ACT NCP Options Paper that in May 1998 Service Corporation International Australia estimated the costs of setting up a crematorium in Canberra to be between \$750,000 to \$1 million. This estimate included a chapel but did not include the cost of the land or the establishment of landscaped areas.

This estimate is in line with a recent estimate provided by a major Victorian cemetery trust to the Department of Human Services in Victoria. The cemetery trust estimated that the cost of the cremation facility that they were proposing would be approximately \$1 million dollars.

The Discussion Paper at page 37 suggests that allowing private operators into the cremation market would be unlikely to lead to a significant change in the number of crematoria in Victoria. The basis of this assertion was a calculation of the population sizes needed for 350 and 520 cremations per year. This calculation was made taking into account a death rate in Victoria of 7.2 per 1,000 and a cremation rate of 3.35 per 1,000 population. The Discussion Paper stated that:

- Three hundred and fifty cremations a year, approximately seven a week, would require a population of 110,000.
- Five hundred and twenty cremations (that is, two per day for a five –day week) would require a population of 155,000.

These figures suggest that private cremators would be unlikely to be established in regional centres that already have a crematorium (Ballarat, Bendigo and Traralgon). However, small crematoria may be a paying proposition in some regional centres that do not currently have a service, such as Warrnambool, Wangaratta and Shepparton.

There is a legitimate concern that private crematoria set up in rural areas of Victoria would be in a monopoly situation as populations in rural areas would be unlikely to sustain more than one crematoria.

However, there also needs to be recognition that the establishment of private crematoria in rural areas of Victoria, even in monopoly situations, benefits surrounding populations as it provides consumers with a local alternative to burial. In rural crematoria monopoly situations there would still be competition from surrounding cemeteries and crematoria elsewhere in Victoria.

Cemetery Set Up Costs

The costs of setting up a commercially viable cemetery would depend on its:

- Size;
- Location;
- Level of development;
- Landscaping; and
- Staffing.

Land purchase costs and development costs (which include establishing roads, pathways, chapels, fences and landscaping) would be expected to be in the millions in a metropolitan area or in a major rural centre.

The Discussion Paper at page 31 suggests that allowing private operators into the burial market would be unlikely to lead to a significant change in the number of cemeteries in Victoria. The basis of this assertion was a calculation of the population sizes needed for 350 and 520 burials per year. This calculation was made taking into account a death rate in Victoria of 7.2 per 1,000, a burial rate of 3.35 per 1,000 population and an assumption that a new cemetery captured 50% of the burial market. The Discussion Paper stated that:

- Three hundred and fifty burials a year would require a surrounding population of 210,000.
- Five hundred and twenty burials a year would require a surrounding population of 310,000.

On these figures, it is unlikely private commercial cemeteries would be established outside Melbourne, and the number established within Melbourne would be very small.

A small increase in the number of cemeteries or crematoria in Victoria is unlikely to be advantageous to consumers as it is unlikely to materially affect prices of burial and

cremation products and services. This is because the burial and cremation market is generally not as price sensitive as other markets because of the importance of location and family and emotional ties to a cemetery or crematorium.

PERPETUAL PUBLIC ADMINISTRATION

One of the key advantages of cemetery trusts over private entities is their perpetual public nature. Cemetery trusts unlike private operations are not dependent on the lifespan or longevity of individuals or businesses within the burial and cremation market or their financial viability. Whilst perpetual tenure of graves and other memorial sites is retained in Victoria there is a considerable advantage in having a public entity with perpetual existence charged with their care.

International experience has shown that private operators within the burial and cremation market have filed for bankruptcy or experienced financial difficulties. If a private operator files for bankruptcy or experiences financial difficulties cemeteries and crematoria may need to be sold to cover debts.

In 1999 one of the largest multinational groups in the international burial and cremation market owned more than 1100 funeral homes and more than 400 cemeteries across the United States, the United Kingdom and Canada. That multinational group and approximately 870 of its subsidiaries recently filed a voluntary petition to reorganise under Chapter 11 of the U.S. Bankruptcy Code. That multinational group and 116 of its Canadian subsidiaries also recently filed for creditor protection under the Companies Creditors Arrangement Act in Canada.

In 1999 that multinational group sold off 124 of its private cemeteries.

In an article by Daniel Fisher published at page 84 of Forbes and dated 18 September 2000 he referred to financial difficulties being experienced by another of the world's largest funeral companies which also has a significant holding of private cemeteries and stated that their shares:

have lost more than 90% of their value in the last 2 years and the company once with a market capitalization of \$10 billion now sits uncomfortably close to bankruptcy.

Sales of cemeteries and crematoria that are privately owned and operated may also occur as business directions change or opportunities for profit arise.

The submissions to the Discussion Paper strongly opposed cemeteries being conducted as other commercial entities, which can be bought or sold and are dependent on the viability and longevity of the operator. The sale of cemeteries was likened to the sale of the dead and the transfer of cemetery records to private concerns was likened to the sale of the State's heritage.

The sale of cemeteries overseas has led to an outcry from bereaved persons and from the communities concerned.

In the United Kingdom the sale of cemeteries such as Arnos Vale in Bristol and cemeteries in Hanwell, Finchley and Mill Hill have drawn public condemnation.

The outcry over what was occurring in a private cemetery known as Arnos Vale was raised in the House of Commons in England and reported in the Hansard debates of 21 May 1998 at Part 27. Whilst discussing a newsletter sent by the private owner of Arnos Vale cemetery to families of persons buried at Arnos Vale which suggested exhumation of graves and reburial elsewhere or cremation of remains The Honourable Jean Corston (the Member for Bristol East) at column 1185 stated that:

That notice must be unprecedented and the public reaction was what any right minded person would expect; extreme distress, revulsion and anger. The culmination was Mr Towner's announcement that he was closing the cemetery permanently. I can not describe the grief and distress that that caused.

Allowing cemetery trusts to be run by public perpetual entities such as cemetery trusts has the advantage that it prevents the sale of cemeteries, prevents their closure to the public and prevents the loss of public access to their records.

PROBITY IN MANAGEMENT

The ACT NCP Options Paper recognises that management of cemeteries by trustees who do not have a financial stake in the operation of cemeteries is likely to provide an appropriate level of probity in their management. It also recognises that this is equally achievable within the private sector and states that:

It is reasonable to assume that trustees operate by definition in the public interest, and their standards of integrity and honesty in doing so are assured. However, it does not follow that there are not powerful incentives for private operators to offer high standards of probity.

Probity in the management of cemeteries and crematoria is important given the potential of cemeteries and crematoria to be used for the unlawful disposal of the dead.

Cemeteries and crematoria do not need to remain within the public sector to ensure a high level of probity in their management. A licensing system could be introduced which assesses whether persons who apply to conduct private cemeteries and/or private crematoria are fit and proper persons to run cemeteries or crematoria.

It must be recognised that the introduction of a licensing system into a market also limits the entry of participants into that market and operates as a barrier to competition. It would however be a lesser restriction on competition than exists in the current system.

The introduction of a licensing scheme for cemeteries and crematoria would also significantly increase the costs of regulating the burial and cremation market as it would involve establishing a licensing body, incurring ongoing staffing and administration costs and a marked increase in the enforcement role of the Department of Human Services.

PRUDENTIAL CHECKS

The long-term operation and financial viability of private operators is of concern if private operators are allowed to enter the burial and cremation market in Victoria. Whilst prudential checks can be done as part of a licensing process the value of these checks diminishes with the passing of time. Private ownership cannot guarantee perpetual existence. Legitimate concerns arise about the consequences if a private operator of a cemetery or crematoria goes bankrupt or ceases to trade. This calls into question the wisdom of allowing private operators to enter a market where the sacred nature of land in which human remains are interred needs to be cared for in perpetuity.

COMMUNITY INPUT

There is an advantage in appointing local persons to be members of cemetery trusts as local persons are aware of community values and concerns and are committed to their local communities. In a submission to the Cemeteries Act review it was stated that:

The Trustees represent the voice of the community and are sensitive to the issues facing the community.

The extent to which members of cemetery trusts are representative of their communities would differ between cemetery trusts.

Retaining cemetery trusts as administrators of cemeteries and crematoria is not the only way to ensure community input into their operation. Private cemeteries and crematoria could be required to consult local communities as a condition of their licence. Guidelines or codes of conduct for the operation of cemeteries and crematoria could also be developed that included the requirement to consult local communities.

Private operators would also need to be mindful of the concerns of local communities as local communities are their customer base. The private sector is likely to make greater use of market research as a means of eliciting community views.

Cemeteries and crematoria do not need to remain within the public sector to ensure community input into their operation.

SKILLS AND EXPERTISE OF MANAGEMENT

One of the deficiencies of the current system is that members of cemetery trusts may be appointed solely because they represent sections within the community in which a cemetery is located without regard to their accounting, management or business skills or expertise.

This may be remedied by moving away from cemetery trusts as the managers of cemeteries and crematoria. Alternatively, it could be remedied by including in the Act criteria for the appointment of members of cemetery trusts that include a requirement that some of the members have accounting, management or business skills and expertise.

PUBLIC HEALTH

There is no reason why private operators could not comply with standards in relation to cemeteries and crematoria that are designed to protect the public health of Victorians. It does not follow that allowing the private sector into the management of cemeteries and crematoria would lead to a lowering of public health standards. As previously outlined, cemeteries and crematoria require a substantial financial investment. A private operator of a cemetery or crematorium would have significant commercial incentives to comply with public health standards, as removal from the market is likely to have detrimental financial consequences.

ESSENTIAL SERVICE

Cemetery trusts run cemeteries in rural and remote areas where the size of the surrounding population would not justify the operation of a cemetery on economic grounds.

The private sector is unlikely to be interested in running cemeteries in rural or remote areas where the surrounding population is insufficient to make a cemetery commercially viable.

In order to attract the private sector to running cemeteries in such areas financial incentives or compensation would need to be offered. This would have to be met by Victorian taxpayers and would be a drain on the public purse.

COMMUNITY SERVICE

Approximately 120 government funded burials of poor and destitute persons are conducted in Victoria each year. These burials are known as Crown burials.

The Department of Justice tenders out the conduct of funeral services for Crown burials in the metropolitan area. In rural areas funeral directors are contracted directly by local police. In 1998/1999 the Department of Justice budget for Crown burials was \$13,501. By mid 2000 increased demand led to over \$27,000 being expended. The cost of funerals for persons who receive a Crown burial may also be subsidised to some degree by the funeral directors who contract to undertake them.

Section 52 of the Act requires cemetery trusts to bury poor persons in the cemetery free of any charge whatsoever upon receipt of an order signed by a Magistrate

Cemetery trusts provide the plot and conduct interments free of charge. Some cemetery trusts also provide a memorial without charge.

According to the Department of Human Services, cemetery trusts save the Victorian government approximately \$2000 for each Crown burial conducted in the metropolitan area and approximately \$1200 for each Crown burial conducted outside of Melbourne.

The private sector could be funded to provide burials and cremations for poor and destitute persons. However, this would be an added drain on the public purse.

MAINTENANCE STANDARDS

Cemeteries which have unused capacity, high demand and competition from other privately owned cemeteries would have an economic incentive to maintain cemeteries to an appropriate standard.

As time progresses and cemeteries fill up in a system that guarantees graves in perpetuity, this economic incentive would be whittled away.

In the ACT NCP Options Paper it is stated at page 32 that:

The incentives to invest in an acceptable level of upkeep could be construed by some as being more related to the maintenance of facilities in the public interest rather than ensuring private incentives promote demand for cemetery services.

However, this benefit would not be realised in full if the public provider failed to charge for the full amount of maintenance costs over time.

Whether cemeteries remain in the public domain or move to the private sector the long term costs of maintenance of graves and memorial sites in Victoria needs to be addressed.

REDUCTION OF MARKETING OF PRODUCTS AND SERVICES

The potential cost of public provision of cemeteries and crematoria in terms of less emphasis by cemetery trusts on marketing and a corresponding lower awareness in the community of the products and services that are available is of limited scope.

Most consumers consider that death is a long time away and would not take a great deal of interest in the products and services available at a cemetery or crematorium. Marketing is likely to increase consumer awareness of the existence of a particular cemetery or crematorium rather than increase awareness of the products and services that are on offer there.

LIMITATION OF SERVICES TO CORE PROVISION

The potential cost of public administration of cemeteries and crematoria in terms of concentration on core provision rather than additional services (such as counselling and insurance) is of minimal impact as these services are available elsewhere.

VERTICAL INTEGRATION

The concept of vertical integration is defined in the ACT NCP Options Paper at page 52 as:

when a company owns and controls some or all of the stages in the provision of a good or service.

In the context of the burial and cremation market it may occur where one participant in the industry provides funeral directing services, floristry services, produces coffins and caskets and owns cemeteries and crematoria.

The Act limits vertical integration of the death care industry by preventing anyone other than a cemetery trust setting up and operating cemeteries and crematoria in Victoria.

Proponents of vertical integration argue that it is beneficial as it allows consumers the convenience of one stop shopping and promotes cost savings in respect of premises, staffing and resources and lowers overheads for vertically integrated businesses.

Those opposed to vertical integration argue that it is not appropriate in the death care industry because of the vulnerability of those making purchasing decisions in terms of the emotional stress that they are under, their lack of knowledge of products and services which are available, their lack of knowledge of comparative prices and their potential for exploitation.

International experience with vertical integration of death care businesses has been that it does not necessarily lead to cost savings being passed on to consumers in lower pricing. In a U.S article titled An Invitation to Funeral Pricing Abuse at page 9 it was stated that:

One of the most troubling recent developments in the funeral industry is vertical integration...While there may be some physical convenience in one-stop shopping, price surveys indicate that the costs at such locations are significantly higher.

One of the submissions to the Cemeteries Act review discusses some of the concerns with vertical integration and states that:

Certainly a general concern about vertical integration is that it can be used to prevent smaller operators from entering an industry. However, the consequent concentration of market power in the hands of a few operators may not be only to the detriment of consumers: it may also change the face of the industry – and put many present participants out of business, and their employees out of work.

We acknowledge that:

- The purchasers of funerals are often under emotional stress; and
- The potential exists for the funeral director to exploit consumers either through pricing or through biased advice.

We also agree that the greater the degree of vertical integration within the industry, the greater the potential for exploitation.

Vertical integration provides significant incentives to discourage comparative pricing. It also provides significant incentives to engage in anti-competitive practices such as refusing to allow plaques or memorials purchased from a competitor to be used in a cemetery or crematorium.

The 1992 Prices Surveillance Report on the funeral industry was critical of the effects of vertical integration in the death care market.

When proposed acquisitions in the death care market tend to promote vertical integration the Australian Competition and Consumer Commission has at times taken action such as requiring undertakings from the operator proposing to make the acquisition which guard

against some of the negative effects of vertical integration. Undertakings that have been made include that:

- There be separate management and staff of funeral and cremation businesses owned by the same operator;
- Exclusive discounts and other financial advantages are not to be given by a crematorium to funeral businesses owned by that operator; and
- Confidential information provided to the crematorium is not to be passed on to the funeral businesses of the operator.

The cost of limiting vertical integration of the death care industry in terms of preventing one stop shopping is of minimal significance as the bereaved can use funeral directors to organise burials and cremations on their behalf.

The cost of limiting vertical integration of the death care industry in terms of preventing the reduction of overheads is also of limited concern as international experience has been that cost savings have not been passed onto consumers in terms of lower pricing.

The benefit of limiting vertical integration in terms of:

- Reducing the potential for exploitation of consumers;
- Preventing consumer choices being artificially limited;
- Preventing consumers from being pushed into taking products or services that they do not want; and
- Preventing the use of confidential information given to one arm of a vertically integrated business for marketing purposes of another arm of the business;

outweigh the costs of this restriction on competition.

The issue of whether total vertical integration of the death care industry should be allowed in Victoria only arises if it is determined that cemeteries and crematoria should be opened up to the private sector.

RECOMMENDATION

- That the restriction on vertical integration of the death care market in Victoria which prevents funeral directors and others in the death care industry operating cemeteries and crematoria be retained.

EFFECT ON CROSS SUBSIDISATION OF PERMITTING PRIVATE OPERATORS INTO THE MARKET

A paper prepared by Lawrie Groom and Company on behalf of the Cemeteries and Crematorium Association of Victoria titled Survey of 1996-1997 Annual Reports Summary of Statewide Results ('the Survey Paper') stated that:

If the State Government allowed non-government interests to operate crematoria, the public cemetery trust system in regional and metropolitan Victoria could lose almost \$10 million per year. An important consequence for Government is that unless other funds were provided by the State (from increased fees, government taxes) crematoria would not be able to contribute current levels of money to fund community service obligations.

The Survey Paper also stated that in 1996-1997 public crematoria contributed:

- \$10.7 million towards the operation of the following cemetery trusts, Memorial Park, Cheltenham, Fawkner Crematorium and Memorial Park, Lilydale and The Necropolis;
- Towards the perpetual maintenance of 991,433 graves in 13 cemeteries in metropolitan Victoria;
- \$1.6 million towards the operation of the following cemetery trusts, Ballarat, Bendigo, Geelong and Traralgon;
- Towards the perpetual maintenance of 283,334 graves in 16 cemeteries outside of the Melbourne metropolitan area.

If private operators are allowed into the burial and cremation market the capacity of public cemeteries and crematoria to cross subsidise maintenance costs and economically unviable cemeteries would be significantly reduced.

There may also be more cemeteries that require financial assistance.

A submission to the Cemeteries Act review stated that:

- If private operation is permitted, there is every likelihood that current cemeteries will become financially stressed...
- Crematoria will be affected, some will not be viable.
- Cemeteries will be affected, some will no longer be viable.

To ensure a level playing field cemetery trusts would need to be relieved of their community service obligations. Alternative arrangements could be made for the community service obligations of cemetery trusts but this would involve a drain on the Victorian public purse.

To ensure competitive neutrality with private operators, cemetery trusts would need to be deprived of the financial advantages that they currently have. (eg use of land which was purchased through a Crown grant rent free). Many cemetery trusts could not make sufficient adjustments to their operations to cover increased costs and would suffer financially as a result of competitive neutrality principles being adopted. This would be particularly acute for cemeteries at the maintenance stage of their life cycle.

The financial detriments suffered by cemetery trusts by the application of competitive neutrality principles may be offset to some extent by the removal of the community service obligations of cemetery trusts.

If the application of competitive neutrality principles to a cemetery trust resulted in that cemetery trust requiring financial assistance this would be an added drain on the Victorian public purse.

PRICES OF BURIAL AND CREMATION GOODS AND SERVICES

The introduction of the private sector into the regulation of cemeteries and crematoria is not likely to result in significant savings through efficiencies as the services of members of cemetery trusts and community members who provide their services gratuitously would be replaced by paid labour.

Prices of products and services in some rural cemeteries (eg \$20 ground fee and \$20 monument fee of the Gowangardie trust) are at a level that may not be economic for private operators to provide.

There are also concerns in some sectors that increased competition from private operators, particularly multinational operators, will lead to the raising of prices in the market rather than the lowering of prices within the market.

Thomas Lynch in his book *Bodies in Motion and at Rest* argued that increased competition from multinationals raises rather than lowers prices. He stated that:

A new bookstore on every corner will result over time in more books being sold. A Taco Bell at every exit will mean more tacos in the food chain. Lower the price of Cadillacs and more Cadillacs show up. But a mortuary on every corner will not budge the numbers on the mortuary tables...as market activity in an unexpandable market increases, the basic price of the goods and services must go up. This is why the price of the McBurger and McNovel and McTwo Bedroom and Bath and a half in the suburbs goes down as increased volume allows for lower unit price, which increases volume even more. Whilst the price of the emerging Mc Funeral goes up to pay for increased costs of acquisitions, advertising and sales in a market where demand is stubbornly dismal.

Jessica Mitford in her book *The American Way of Death Revisited* examined prices in funeral markets in Houston and Washington and found that increased competition from multinationals raised rather than lowered prices.

Thomas Lynch and Jessica Mitford were referring to the funeral industry but their statements are likely to be equally applicable to the burial and cremation market.

Unused Crematoria Capacity

One of the most significant limitations on increased efficiency of crematoria in Victoria is not related to their provision within the public sector. It relates to the fact that demand in Victoria is insufficient to meet the capacity of existing crematoria. There is concern that allowing increased competition will decrease efficiency further by increasing the unused capacity of crematoria and at the same time will increase the cost base of crematoria.

A submission to the Cemeteries Act review stated that:

Each of the three crematoria in the metropolitan area, individually has the production capacity to serve Melbourne. This capacity was determined at a time when it was considered that these were to be the only three crematoria for Melbourne.

Given excess capacity and little growth in the number of deaths each year, the addition of further crematorium capacity to the area is likely to reduce the throughput of each and to decrease the operating efficiency of the process. This will lead to a diversion of funds from service delivery towards actively seeking to take customers from other operators as each attempts to return to productive efficiency. This would increase the

cost base for all operators resulting in upward pressure on prices whilst not adding any value to the consumer.

There is currently considerable unused capacity in the nine crematoria operating in Victoria.

On 20 October 2000 the Fawkner Crematorium and Memorial Park advised the Department of Human Services that the total annual demand for cremations in Victoria is about 15,000 and that Fawkner Crematorium and Memorial Park had the capacity to do all of them.

The email states that:

Currently we are doing approximately 2500, which is 11% of our capacity.

On 23 October 2000 the Bendigo Cemeteries Trust advised the Department of Human Services that it currently completes 450 cremations a year and that:

A scenario of operating 24 hours per day, seven days a week would see current business operate the machine for only 8% of the time.

On 31 October 2000 The Necropolis advised the Department of Human Services that the percentage of their potential capacity that was currently used was 23.7%.

In the Bayside Advertiser on 1 May 2000 Russell Allison the Chief Executive Officer of The Necropolis commented that The Necropolis currently does 5500 cremations a year compared to 7500 less than 10 years ago.

Comparison of Victorian Burial and Cremation Prices with Prices in Other Jurisdictions

Fawkner Crematorium and Memorial Park advised the Department of Human Services on 20 October 2000 that the average cremation cost in Melbourne was \$550.

A survey recently conducted by the Department of Human Services of prices in other States and Territories for a basic cremation (without use of a chapel) suggests that basic cremation prices in Victoria are not significantly different to prices in other jurisdictions.

SA	Centennial Park	\$506
	Enfield	\$495
WA	Metropolitan	\$590
QLD	Beenleigh	\$517-520
	Towoomba	\$540-570
TAS	Ulverstone	\$599
	Kingston	\$695
ACT	Canberra	\$748

NSW	Botany	\$595
	Shoalhaven	\$566.50

The prices of burial products and services in Victoria vary considerably at different cemeteries. There is a range of prices available in Victoria depending upon which cemetery is chosen and the type of burial that is required. There is a significant difference in the price of a burial at eye level in a mausoleum and the price of a burial in a lawn grave.

The diversity of the range of burial prices in Victoria is illustrated by the total cost of a basic plot and internment at the following cemeteries:

Tarnagulla	\$205
Tallangtta	\$420
Port Fairy	\$550
Coleraine	\$550
Casterton	\$930
Phillip Island	\$938
Ballarat	\$1466.50
Fawkner	\$2198.56
The Necropolis	\$2394
Keilor	\$2680

A survey of cemetery fees charged in other States and Territories was recently conducted by the Department of Human Services in Victoria. According to that survey:

- The fees charged by cemetery trusts at the lower end of the scale outlined above would be lower than fees charged in places like the ACT.
- The fees charged at the higher end of the scale outlined above would be comparable to fees charged in Sydney, Brisbane or Hobart.
- The fees charged at the higher end of the scale would be higher than fees charged in Adelaide or Perth.

LEVEL OF COMPETITION

Unlike the burial and cremation market in places like the ACT (where there is only 1 cemetery trust and 1 crematorium) there are already 526 cemetery trusts and 9 crematoria in the Victorian burial and cremation market which need to compete for their share of the market.

RANGE OF GOODS AND SERVICES

Allowing the private sector to operate cemeteries and crematoria may theoretically have the advantage that it will lead to a greater range of burial and cremation products and services being available.

Whether or not this will necessarily follow the opening up of the market to the private sector is not beyond dispute.

There is concern in some sectors that private operators will reduce the choices available to consumers and will concentrate on the more expensive end of the market.

In a submission to the Cemeteries Act review it was stated that:

There may be a tendency of private operators to reduce the range or flexibility of services or, to focus on selling higher priced products. This was mentioned in the PSA (Prices Surveillance Authority) report into pricing by funeral directors...

According to the Department of Human Services the range of burial and cremation products and services in Victoria is comparable to other jurisdictions.

There is likely to be limited scope for an increase in the range of products and services in the burial and cremation market as the value the community places on respect for the dead reduces the capacity for innovation in burial and cremation products and services.

DIGNIFIED CONDUCT

There is fear in Victoria that allowing private multinational operators into the burial and cremation market will lead to increased prices, aggressive sales tactics and generally undignified behaviour. Simon Mulqueen the President of the Victorian Independent Funeral Director's Association in an interview with the ABC on August 31 1999 referred to this fear.

There is also fear that private operators would use confidential databases or records of cemeteries and crematoria as a source to compile marketing lists.

There is no guarantee that cemetery trusts will deal with deceased persons in a more dignified fashion than private operators. However, the fact that they are not driven by accountability to shareholders, or the need to maximise profits to receive a good return on a huge capital investment, places cemetery trusts under less pressure to enter into aggressive sales tactics and undignified behaviour.

Miriam Horn in an article in the US News titled "The Goliaths of the Funeral Industry Are Making Lots of Money Off Your Grief" outlined some of the aggressive selling practices that are used in the United States by private operators in the burial and cremation market. She referred to complaints from consumers that they are ambushed by salesmen when visiting the graves of loved ones or are solicited after paying their respects at a funeral. The article gives the impression that the dignity of deceased persons is at times being compromised by the pursuit of profit. By way of illustration she referred to a seminar sponsored by an industry newsletter and stated that:

One speaker advised funeral directors "how to add \$1400 to each cremation call" by requiring an "identification viewing" of the loved one. "If the family has not opted for an expensive container, make sure you show them Mom's body in the cardboard box. Someone in the family is bound to say "Maybe we should get something nicer".

Daryl J Roberts in an article titled "Profits of Death" outlined some of the undignified behaviour by private operators that occurs within the burial and cremation market in the United Kingdom. He referred to:

- Condolence calls on a deceased's family shortly after a deceased's death which are in reality merely sales opportunities to sell further burial or cremation products and services;
- Restrictions on memorials purchased elsewhere; and
- Soliciting of pallbearers and mourners after attendance at the cemetery.

The aggressive sales tactics and undignified behaviour outlined is not necessarily endemic in a private marketplace.

Further, restricting the entrants into the burial and cremation market is not the only way in which aggressive sales tactics and undignified behaviour can be curtailed. Other options include:

- Prescriptive regulation;
- Codes of conduct;
- Funding consumer complaints bodies and consumer legal centres;
- Undertaking education campaigns; and
- Raising behaviour of concern with the Australian Competition and Consumer Commission.

The prevention of aggressive sales tactics and undignified behaviour within the burial and cremation market is not sufficient justification to restrict entrants into the burial and cremation market.

RELIGIOUS AND CULTURALLY APPROPRIATE DEATH RITES

Section 15 of the Act prevents cemetery trusts from interfering with religious ceremonies and distributions of land to religious denominations.

Section 16 of the Act requires cemetery trusts to allow Ministers of any denomination to have free access and admission to a cemetery to exercise spiritual functions.

There is no reason why the private sector could not be expected to ensure that religious and culturally appropriate death rites and denominational distributions are not interfered with at private cemeteries or crematoria if this was mandated by law.

The fact that the facilities are conducted on private property does not make the facilities above the law. Equal opportunity and anti discrimination legislation equally apply on private property.

It is not necessary to keep cemeteries and crematoria in the public sector to ensure religious and culturally appropriate death rites.

SUPPORT FOR PUBLIC PROVISION OF CEMETERIES AND CREMATORIA

Ninety five percent of the submissions received in response to the Discussion Paper strongly opposed allowing private operators to enter the burial and cremation market. There was also strong support in the submissions for the continuation of the current system of administration of cemeteries and crematoria by cemetery trusts.

The fact that opening up the market to the private sector does not have public support in Victoria is also supported by a submission to the Cemeteries Act review that states that:

A recent survey of customers showed that only nine percent of respondents considered the transfer of cemetery operations to the private sector to yield potential consumer benefits.

ALTERNATIVES TO RESTRICTIONS ON ENTRY INTO THE BURIAL AND CREMATION MARKET

Position in Other States and Territories

Private operators are able to enter the burial and cremation market in New South Wales, Queensland and South Australia.

The Northern Territory recently allowed private crematoria to operate outside a public cemetery.

In the ACT the Cemeteries Act 1933 prevents private operators entering the market for cemetery services. The ACT Cremation Act 1966 does not prevent private operators entering the cremation market.

The ACT NCP Report recommended the removal of restrictions on who can provide cemetery services in the ACT.

On 13 July 2000, Brendan Smyth MLA, the ACT Minister for Urban Services stated that the ACT Government would be accepting that recommendation. He indicated that the ACT Government would remove the legislative restriction that limits the right to ownership and operation of all ACT cemeteries to the Canberra Public Cemeteries Trust. This would allow the possibility of privately operated cemeteries in the ACT.

CONCLUSION ON ENTRY OF PRIVATE OPERATORS INTO THE BURIAL AND CREMATION MARKET

The benefits of public provision of cemeteries and crematoria (which have sites where ashes are interred) outweigh the costs of limiting provision to the public sector.

This is primarily because private operators are not able to guarantee perpetual protection or care for land in which human remains or ashes are interred. A licensing system which includes prudential screening cannot ensure the financial viability of an operator indefinitely nor can it ensure that the operator or its shareholders will not choose at some point in time to cease operating. The outcry that has occurred overseas when cemeteries have been sold should be avoided in Victoria.

Provision of burial and cremation products and services by the private sector would not necessarily result in a lowering of prices or a greater range of products and services being available.

Opening up the burial and cremation market to private operators is also likely to be opposed by public opinion in Victoria.

Further, until a suitable alternative source of funding is identified for the community service obligations of cemetery trusts, allowing the private sector to enter the burial and cremation market would be a significant drain on the public purse.

The desirability of public administration is however, more compelling in reference to cemeteries than crematoria.

There is no need for the process of cremation of bodies and the ownership of any cremation plant and equipment to be restricted to public structures that have perpetual existence.

Crematoria memorial sites cannot be equated to the plant and equipment of a crematorium. They are analogous to cemeteries in terms of the special nature of the land on which they are situated.

Crematoria that are simply incineration facilities without memorial sites for cremated remains may warrant different treatment to crematoria that include sites for the interment of cremated remains.

One option would be to allow the operation of private crematoria that are simply stand-alone incineration facilities.

The ACT NCP Report states at page 55 that:

boutique and offsite crematoria have apparently proved to be effective and practical overseas and in other jurisdictions in Australia.

The benefit of this option is that it would allow the development of private incineration facilities in regional centres of Victoria that currently do not have cremation services (such as Warrnambool, Wangaratta and Shepparton) and would allow some increased competition in the cremation market without compromising the protection of the land in which ashes are interred.

It may also allow for a cheaper cremation option to be available in the Victorian market as stand alone incineration facilities would not have the upkeep costs of crematoria with memorial sites.

The detriment of this option is that it may further reduce the efficiency of existing crematoria by increasing their unused capacity.

This option would require exploration of whether stand alone crematoria facilities without memorial sites are feasible in Victoria as commercial entities and whether such crematoria would be of interest to the private sector.

RECOMMENDATIONS

- That the sale of cemeteries and crematoria with memorial sites be prohibited.
- That cemeteries remain within the public sector.

- That crematoria which include memorial sites for interred ashes remain in the public sector.
- That the Department of Human Services consult with industry to determine whether stand alone crematoria facilities without memorial sites are feasible in Victoria as commercial entities and whether such crematoria would be of interest to the private sector.
- That if private crematoria without memorial sites are found to be commercially feasible and attractive to the private sector in Victoria, the private sector be allowed to operate such facilities if a planning permit is obtained, subject to satisfaction of licensing criteria.
- That private operators continue to be excluded from the cremation market until a suitable alternative to cross subsidisation of cemeteries and crematoria is investigated and implemented.
- That licensing criteria for the provision of stand alone incineration facilities include consideration of whether the persons who are to operate the facility are fit and proper, whether they are capable of operating the facility at an appropriate standard and whether the proposed facility and its equipment are suitable for the protection of public health, public dignity and the environment.
- That criteria for the appointment of members of cemetery trusts be set out in the Act and require some members of the cemetery trust to have management, accounting or business skills and expertise.
- That consideration be given to merging some of smallest cemetery trusts where there are other local cemetery trusts operating in close proximity.
- That a power for the Secretary to the Department of Human Services to contract out the operation of a cemetery be provided. This would give the Secretary the option of exploring contracting out arrangements as an alternative to giving responsibility for an uneconomically viable cemetery to another cemetery trust to administer.
- That contracted cemetery or crematorium providers have all the powers and obligations of a cemetery trust.

ASSESSMENT OF THE RESTRICTIONS ON CONDUCT WITHIN THE BURIAL AND CREMATION MARKET

LINKS BETWEEN THE OBJECTIVES OF THE ACT AND THE RESTRICTIONS ON CONDUCT WITHIN THE BURIAL AND CREMATION MARKET

There appears to be a number of assumptions underlying the Act about the best means to ensure that burials, cremations and exhumations are conducted appropriately to protect public health, public dignity, the preservation of places and records of historical or social significance and the interests of justice.

First, there appears to be the assumption that leaving the operation of cemeteries and crematoria to market forces will not ensure that burials, cremations and exhumations are conducted appropriately to protect public health, public dignity, the preservation of places and records of historical or social significance and the interests of justice.

Second, there appears to be the assumption that limitation of burial and cremation to within a public cemetery is beneficial to keep burials and cremations within the scheme of regulation in the Act.

Third, there appears to be the assumption that a power to discontinue burials and cremations is necessary in the interests of public health and public dignity to prevent cemeteries from over filling and over selling rights of burial and to prevent cremations being conducted in a manner which may be injurious to public health.

Fourth, there appears to be the assumption that the market and ordinary business practice cannot guarantee appropriate record keeping and registration of burials and cremations.

Fifth, there appears to be the assumption that having permit, permission and licence processes for burial cremation and exhumation will assist in ensuring that bodies are not disposed of to avoid investigation by the police or the Coroner.

Sixth, there appears to be the assumption that the preservation of cemeteries will be served by placing restrictions on cemeteries that can be converted into pioneer memorial parks.

BENEFITS OF THE RESTRICTIONS ON CONDUCT WITHIN THE BURIAL AND CREMATION MARKET

The benefits of the restrictions on the manner in which burials, cremations and exhumations are conducted may include:

- The protection of public health from risks which include the escape of water from graves or vaults into water catchments;
- Ensuring that deceased persons are disposed of in a dignified fashion;
- Ensuring as far as possible that bodies are not buried, exhumed or cremated to avoid the criminal law;
- Ensuring as far as possible that the bodies of persons who die in suspicious circumstances can be exhumed for investigation by the police and the Coroner;
- Ensuring as far as possible that cremation of persons who have requested that their bodies not be cremated does not occur;
- Ensuring that records of burial and cremation are kept and preserved and that public access and searches are facilitated;
- Preserving cemeteries by limiting conversion of cemeteries into pioneer memorial parks; and
- Ensuring as far as possible that community expectations and standards are met in relation to burials and cremations.

COSTS OF THE RESTRICTIONS ON CONDUCT WITHIN THE BURIAL AND CREMATION MARKET

The costs of the restrictions on the manner in which burials, cremations and exhumations are conducted may include:

- Limiting consumer choice to burial and cremation within a cemetery;
- Increasing the cost of the provision of burial and cremation services as burial or cremation in the backyard would be cheaper than burial or cremation at a cemetery;
- Requiring families of deceased persons and others to pay the cost of an exhumation licence fee which is currently \$60;
- Restricting the ability of cemeteries and crematoria to determine how they will operate;
- Restricting the ability of cemeteries to convert to pioneer memorial parks;
- Limiting competition and the operation of market forces on the manner in which burials, cremations, and exhumations are conducted;
- Additional administration costs for cemeteries and crematoria involved in the registration of burials and cremations;
- Additional administration costs for cemeteries and crematoria in relation to burial permits and consents to cremation;
- Increasing the prices of burial and cremation products and services as increased costs of provision are likely to be passed on to consumers;
- The time and administration costs of medical practitioners required to complete a Certificate of Medical Attendant or a Certificate of Licensed Medical Practitioner Authorizing Cremation;

- The time and administration costs of medical practitioners involved in the licensing process required to be able to sign a Certificate of Licensed Medical Practitioner Authorizing Cremation;
- Costs to the health system for the time of medical practitioners required in relation to cremations;
- Costs to the estates of deceased persons of medical fees which are not met by Medicare in relation to cremation certificates and authorisations; and
- Administration costs to government involved in the licensing process for medical practitioners authorized to sign a Certificate of Licensed Medical Practitioner Authorizing Cremation set out in the Third Schedule to the Act.

COSTS V. BENEFITS OF THE RESTRICTIONS ON CONDUCT WITHIN THE BURIAL AND CREMATION MARKET

LIMITATION ON BACKYARD BURIALS AND CREMATIONS

The Act limits consumer choice to burial and cremation within a cemetery unless the consent or approval of the Secretary is obtained. This effectively minimises use of backyard burials and cremations as a cheaper alternative.

These restrictions are intended to keep burials and cremations within the scheme of the Act in terms of the protection of public health, the protection of public dignity and the preservation of places and records of historical and social significance.

It would be extremely difficult to ensure that backyard burials and cremations were conducted in a manner that does not pose a risk to public health and would not offend public dignity. It would also be difficult to ensure that appropriate records were kept of backyard burials and cremations. If human remains were interred in a backyard their preservation may only continue whilst the property remained within a family. Respectful treatment of remains could not be assured if the land was sold or redeveloped.

The benefits outlined outweigh the costs of any limitations on consumer choice of where to be buried or cremated and also outweigh the added costs of burial within a cemetery and cremation within a crematorium.

PUBLIC HEALTH

Unlike legislation in places like the ACT the Act is not prescriptive about the day-to-day operation of a cemetery or crematoria. The day-to-day operation of cemeteries and crematoria is to a large extent left to the discretion of cemetery trusts. The Act does however impose restrictions, which are aimed at reducing public health risks (eg that graves and vaults must be water tight).

The benefit of ensuring that burials and cremations are conducted in a manner that does not put public health at risk outweighs any additional costs incurred in complying with the restrictions on the manner in which burials, cremations and exhumations are conducted.

Similarly, the protection of public health justifies provision in the Act of a power to order the discontinuation of burials or cremations. The power to discontinue burials is generally used to stop further burials at a cemetery that is full. This is necessary as historically over filling of cemeteries has been a public health concern. The power to stop cremations could be used to guard against faulty cremation procedures and unsuitable equipment.

The Act also provides a licensing process for use of rights of burial where there is an order that burial in a cemetery should be discontinued. The Act provides that licence applications are intended to take into account whether burial would be injurious to public health. A licence fee is not set out in the Act. The licensing system for use of right of burials in closed cemeteries is not currently in use as closure of cemetery orders made by the Governor in Council generally state that the order does not apply to burials in allotments of land the right of burial in which has already been purchased from the cemetery trust. The licensing process for use of rights of burial where there is an order that burial in a cemetery should be discontinued is not necessary and should be repealed.

PIONEER MEMORIAL PARKS

The restriction that cemeteries can not be converted into pioneer memorial parks without a proposal being submitted to the Secretary to the Department of Human Services and approved by the Minister has the advantage that it prevents the destruction of old cemeteries without due consideration.

Removal of monuments is a very drastic step as it removes a marker of the existence of a human being on the earth. Deceased Victorians deserve some protection from the State as they are not in a position to protect themselves and may not have any family or anyone else left to defend the protection of their memorial.

Tombstones or monuments may also have historical or social significance that needs to be taken into account.

The conversion of cemeteries into pioneer memorial parks has the advantage that it significantly reduces maintenance costs of a cemetery.

The last cemetery converted into a pioneer memorial park was Oakleigh Public Cemetery. This occurred on 27 March 1988.

Proposals to convert the Coburg Public Cemetery into a pioneer memorial park were vehemently opposed by the community and led to the formation of the Save the Coburg Cemetery Action Group.

In 1997 a proposal to exhume and relocate the remnants of human remains at Oakleigh Public Cemetery was also opposed by the community.

It appears that further conversions of cemeteries into pioneer memorial parks may not have proceeded in the last decade because of the unpopularity of such conversions and community opposition.

This suggests that retaining restrictions on the conversion of cemeteries into pioneer memorial parks would be supported by public opinion in Victoria and should be retained.

The fact that there has not been a conversion of a cemetery into a pioneer memorial park in the last decade calls into question whether conversion of cemeteries into pioneer memorial parks should be prohibited and the approval provision repealed.

Removal of the approval process would close up the only means in the Act to reduce maintenance costs at a cemetery. This action is not supported, as it may be necessary as cemeteries grow and maintenance costs escalate to convert some cemeteries into pioneer memorial parks.

The restriction in the Act that only the cemeteries listed in the Fourth Schedule of the Act can be converted into pioneer memorial parks should be removed. This restriction is anti-competitive as the ability to convert to a pioneer memorial park has financial advantages for a cemetery. It also means that the Act needs to be amended every time it is considered that another cemetery should have that option available. Amendment of an Act involves a lengthy process and incurs costs for the Victorian public purse.

RESTRICTION ON WHERE A CREMATORIUM CAN BE CONSTRUCTED

Section 66 of the Act sets out the minimum distance from a house, highway or street at which a crematorium can be constructed. This provision should be repealed as the location of crematoria is an amenity issue that should be addressed in planning legislation.

BURIAL PERMITS

Section 19 of the Act provides that bodies are not to be buried without a burial permit. This is intended to ensure that burial does not occur without production of a death notification under the Births, Deaths and Marriages Act 1996, a statutory declaration that this is not possible due to special circumstances, or permission to bury under the Coroners Act 1985.

The requirement for an officer of a cemetery trust to cite one of three alternative documents before issuing a burial permit is not onerous or labour intensive. It would not involve significant administration costs as officers of cemetery trusts would, as part of their day to day operations, need to meet with persons arranging burials to obtain details about deceased persons and burial specifications.

The benefits to the interests of justice in ensuring that bodies are not buried without the death being recorded under the Births, Deaths and Marriages Act 1996, or without permission from the Coroner where this is necessary, would outweigh any additional administration costs associated with this restriction.

CREMATION APPROVALS

Section 77 of the Act requires an application for a cremation to be accompanied by one of four alternate forms:

- A form as set out in the Third Schedule to the Act;

- A form from the Coroner under the Coroners Act1985 certifying that cremation is permitted;
- An authority to cremate from the State where the deceased died; or
- Authorisation to cremate from the Secretary to the Department of Human Services in Victoria.

The requirement for an officer of a cemetery trust to cite one of four alternative documents before signing a permission to cremate form is not onerous or labour intensive. It would not involve significant administration costs as officers of cemetery trusts would, as part of their day to day operations, need to meet with persons arranging cremations to obtain details about deceased persons and cremation specifications.

There are two parts to the form set out in the Third Schedule to the Act.

Part A is a Certificate of Medical Attendant who signed the death notice. The form asks a number of questions related to the cause of the deceased's death. It also requires the medical practitioner to certify that the answers provided are true and accurate and that the doctor has no reason to suspect that the deceased died either a violent or unnatural death or a sudden death of which the cause is unknown or died in such a place or circumstances as to require an inquest.

Part B is a Certificate of Licensed Medical Practitioner Authorizing Cremation. A doctor who has not personally attended the deceased and who has been licensed by the Minister to provide such certificates must sign this certificate. This certificate requires the medical practitioner to:

- Peruse the certificate of the attending doctor provided under Part A;
- Peruse the application for cremation;
- Examine the body of the deceased; and
- Independently inquire into the circumstances of the death.

The licensed medical practitioner must certify that there are no circumstances connected with the death that could make exhumation of the body necessary and that there is no circumstance concerning the death that demands further inquiry in the interests of justice before the body is cremated.

Involvement of Two Medical Practitioners In Cremation Certifications

Cremation of a body prevents an autopsy and destroys critical evidence necessary for an investigation into a suspicious death. The interests of justice require that an appropriate system of checks and balances is in place to ensure as far as possible that bodies which are cremated are not needed for an autopsy or other investigation by the police or the Coroner.

The involvement of two medical practitioners involves additional costs such as the time involved for both medical practitioners and the fees that private medical practitioners may charge for the provision of this service. It also delays cremations.

The involvement of two medical practitioners in signing cremation forms has been criticised by some of the submissions made in response to the Discussion Paper. One of the submissions to the Cemeteries Act review suggests that the second medical certificate is unnecessary if the requirements of the first certificate have been fully met.

The object of the certification of the second medical practitioner is to ensure an independent assessment of the cause of death and an independent assessment of whether there are any suspicious circumstances before a cremation can be carried out.

A recent case in the United Kingdom where there were suspicious circumstances surrounding the deaths of a number of patients of one particular medical practitioner illustrates the benefit of having a system where the original certification by the treating doctor is verified by an independent medical practitioner.

There is also a benefit in having opinions from two medical practitioners as one medical practitioner may pick up something that the other has missed, particularly in view of the fact that a body that has been cremated is not available for further examination.

The benefits to the interests of justice of the dual certification requirements outweigh the costs of the involvement of two medical practitioners and any delays occasioned by these requirements.

Licensing of the Independent Medical Practitioner for Cremation Certifications

Section 77 requires the medical practitioner who signs Part B of the form set out in the Third Schedule to the Act to be licensed by the Minister under section 78 of the Act.

This involves the costs of medical practitioners time spent in making licensing applications. It also requires the Department of Human Services to incur costs in respect of the administration of the licensing process.

The licensing of medical practitioners who sign this certificate was seen as unnecessary in a number of the submissions made in response to the Discussion Paper.

The criticism of this restriction is valid. The Medical Practice Board registers medical practitioners and is responsible for overseeing medical ethics. Licensing adds a further unnecessary layer of administration on top of registration as a medical practitioner.

The requirements that need to be satisfied for a medical practitioner to become licensed are not onerous. A medical practitioner needs to make an application on the practice's letterhead and provide proof of current registration.

Administration costs are incurred by the Department of Human Services in processing licensing applications and issuing licences.

As the restriction is unnecessary the costs of the restriction outweigh its benefits.

The licensing restriction should be repealed. Registration as a medical practitioner should be accepted as sufficient qualification for entitlement to complete the certificate in Part B of the Third Schedule of the Act.

Proof of current registration as a medical practitioner could be obtained without a licensing process by requiring that the medical practitioner attach proof of current registration as a medical practitioner to the Part B Certificate.

REGISTRATION OF BURIALS AND CREMATIONS

Cemeteries and crematoria would in the absence of provisions requiring registration of burials and cremations continue to keep some type of records of burials and cremations as part of their day to day operations because of consumer demand.

Appropriate record keeping in respect of burial and cremations is however too important to be left to market forces.

The benefits of ensuring that records of burial and cremation are kept in an appropriate manner and preserved and that public access and searches are facilitated would outweigh any associated administration costs of the registration requirements. The costs of compliance would in any event be minimal as record keeping is part of the ordinary operation costs of a cemetery or a crematorium.

EXHUMATIONS

The Regulatory Impact Statement for the Cemeteries Regulations 2000 at page 15-16 provides a useful explanation of the exhumation restrictions and the operation of the licensing process for exhumations. It states that:

In Victoria it is an offence to exhume a body except in accordance with the Coroners Act 1985 or pursuant to a licence granted under the Cemeteries Act 1958. The Act makes provision for the granting of a licence by the Secretary of the Department of Human Services for the exhumation of any body or the remains of any body interred in any cemetery burial ground or place of burial. The Act also requires that the prescribed fee be paid for the issuing of an Exhumation licence. A licence is not required for the removal of cremated remains.

Members of the public seek Exhumation licences for a variety of reasons, for example, in order to reunite the remains of family members in one cemetery, to remove remains from a grave for burial in a mausoleum, to remove remains for cremation or to move the remains of loved ones to a cemetery which is nearer to their home.

The Secretary granted one hundred and twelve Exhumation licences in 1999.

Exhumation of the remains of a loved one is sometimes a cause of distress and disagreement between members of the immediate family of the deceased.

In issuing the Exhumation licence the Secretary considers various matters including the relationship to the deceased of the person making application and the views of the person holding the right of burial. The Secretary also undertakes a number of checks to ensure that the correct body would be exhumed if the licence were granted...

If a licence is issued, the details including any conditions are recorded in the Department's register....Aside from the requirements of the Act, it is necessary for the Department to have a record of the exhumations which have been approved in order to provide a reliable public record of the place of burial of individual human remains.

In addition, following the issuing of an Exhumation licence, an Environmental Health officer or another officer of the Department or an officer from the cemetery who has been authorised by the Department must attend the exhumation.

In financial terms, it costs the Department of Human Services approximately \$230 to process and issue an Exhumation licence and oversee an exhumation.

...The fee charged for the issuing of an Exhumation licence is not intended to achieve full cost recovery. The cost to the public of an Exhumation licence (currently \$60) is nominal and is intended to be a contribution to the cost of the Department administering this provision of the Act.

... the cost of an Exhumation licence is not expected to place an onerous burden on members of the general public seeking an Exhumation licence.

...Additional fees for the actual exhumation of remains are charged by Cemetery Trusts.

The benefits of the licensing process relate to:

- The protection of public health as persons exhuming a body may be at risk if a deceased person died of an infectious disease and an exhumation is done inappropriately;
- Ensuring that exhumations are not done to avoid the criminal law;
- Ensuring that the right body is exhumed; and
- Ensuring that human remains are treated with dignity and not exhumed without reasonable cause.

The costs of the licensing process are:

- The reduced availability of exhumation as an option for relatives of a deceased person;
- The administration costs to cemeteries associated with ensuring that exhumations are not carried out without a licence and that any conditions of a licence are complied with;
- The \$230 cost to the Department of Services for each exhumation; and
- The \$60 cost to consumers for each exhumation.

The benefits of the restrictions outlined above in relation to the protection of public health, the maintenance of public dignity and the interests of justice outweigh any limitations on consumer choice and also outweigh any additional costs associated with the licensing process.

RECOMMENDATIONS

- That the restriction in the Act prohibiting the conduct of burials and cremations outside a cemetery unless the consent or approval of the Secretary to the Department of Human Services is obtained be retained.

- That restrictions which are aimed at reducing public health risks (eg that graves and vaults must be water tight) be retained.
- That the power to discontinue burials and cremations by order be retained.
- That the requirement of a licence for use of a right of burial where there is an order that burial in a cemetery should be discontinued be repealed.
- That the approval process for the conversion of cemeteries into pioneer memorial parks be retained.
- That the restriction in the Act that only the cemeteries listed in the Fourth Schedule of the Act can be converted into pioneer memorial parks be repealed.
- That the restriction on where a crematorium can be constructed be repealed and included in planning legislation.
- That the restriction that bodies are not to be buried without a burial permit and without the production of prescribed documents be retained.
- That the restriction that bodies are not to be cremated without permission to cremate and without the production of prescribed documents be retained.
- That consideration be given to removing the cremation forms in the Third Schedule of the Act and including them in regulations. This would remove the need for the Act to be amended every time a change to the forms is required.
- That the dual certification requirements by two medical practitioners be retained.
- That the licensing requirement for medical practitioners who sign Part B of the cremation consent form be repealed.
- That requirements in respect of the registration of burials and cremations be retained.
- That the licensing process for exhumations be retained.
- That the requirement to pay a fee for an exhumation licence be retained.

ASSESSMENT OF THE RESTRICTIONS ON FEES WITHIN THE BURIAL AND CREMATION MARKET

LINKS BETWEEN THE OBJECTIVES OF THE ACT AND THE RESTRICTIONS ON FEES WITHIN THE BURIAL AND CREMATION MARKET

There appears to be a number of assumptions underlying the Act about the best means to ensure that fees for burial and cremation products and services will remain reasonable and accessible.

First, there appears to be the assumption that by requiring fees to be approved by the Governor in Council fees for burial and cremation products and services in Victoria will be set at appropriate levels.

Second, there appears to be the assumption that by requiring fees for burial and cremation products and services to be published in the Government Gazette the fees of cemeteries and crematoria will be accessible and price comparisons will be fostered.

Third, there appears to be the assumption that competition and market forces cannot guarantee appropriate pricing of burial and cremation products and services.

Fourth, there appears to be the assumption that maximising profits is not an appropriate objective of cemeteries and crematoria.

Fifth, there appears to be the assumption that transparency of pricing (itemisation of components of cemetery and crematoria fees) is beneficial to consumers.

BENEFITS OF THE RESTRICTIONS ON FEES WITHIN THE BURIAL AND CREMATION MARKET

The benefits of the restrictions on fees within the burial and cremation market may include:

- Keeping fees for burial and cremation products and services at reasonable levels which are within reach of the majority of Victorians;
- Ensuring stability of fees within the burial and cremation market;
- Preventing price increases which are unreasonable in scale or frequency;
- Ensuring the availability of pricing information to allow price comparisons;
- Ensuring transparency of fee structures;

- Protecting consumers from fee bundling which may force consumers purchasing even the most basic packages to pay for services that they may not want or need;
- Ensuring fees at small cemeteries are set at appropriate minimum levels to cover costs; and
- Ensuring public accountability of public cemeteries and crematoria.

COSTS OF THE RESTRICTIONS ON FEES WITHIN THE BURIAL AND CREMATION MARKET

The costs of the restrictions on fees within the burial and cremation market may include:

- Limiting the fees that can be charged;
- Restricting the ability of cemeteries and crematoria to determine their fees based on their individual cost structures and development programs;
- Restricting the ability of cemeteries and crematoria to bundle fees into package deals;
- Limiting the ability of cemeteries and crematoria to maximise their profits;
- Creating a time lag in respect of the variation of fees because of the time involved in having fees approved and published in the Government Gazette;
- Limiting competition and the operation of market forces in price structuring;
- Additional administration costs for cemeteries and crematoria involved in the submission of fees for approval; and
- Additional administration costs for government involved in the fee approval process.

COSTS V. BENEFITS OF THE RESTRICTIONS ON FEES

LIMITATION ON THE FEES THAT CAN BE CHARGED

Section 17 of the Act states that:

A cemetery trust may from time to time with the consent of the Governor in Council make and publish in the Government Gazette a scale of fees payable on any vault or grave being dug or made and any monument or tombstone being erected or placed in any part of any such cemetery and any inspection of records...

This is a very restrictive limitation on the fees that can be charged by cemeteries. It does not provide for a large range of fees that should be able to be charged (eg. maintenance fees, fees for use of a chapel, or fees for exhumations).

The limitation in section 17 of the Act on the fees that cemeteries can charge is out dated and should be repealed.

THE APPROVAL PROCESS

The Discussion Paper refers to concern amongst cemetery trusts about the fee approval process. It states at page 54 that:

The approval of the scale of fees is a source of frustration and delay to trusts.

The concern of cemetery trusts with the limitations on their pricing discretion is echoed in the submissions received in response to the Discussion Paper.

The approval process is intended to ensure that fees in the burial and cremation market remain reasonable, stable and transparent. It is intended to ensure that cemetery trusts that provide products and services within the public sector are accountable. It is also intended to protect consumers as the emotional nature of the burial and cremation transaction lessens the ability of consumers to be able to protect themselves.

The benefits of the approval process outlined above are important given the nature of the burial and cremation market. There is also a genuine concern that burials and cremations remain affordable and are not merely targeted at the most profitable end of the market.

The costs of these restrictions in terms of limiting pricing discretion, building in delays in price variations and the additional administration costs which the approval process necessitates are unwarranted as the reality is that most fees submitted by cemetery trusts for approval by the Governor in Council are approved.

The benefits outlined above can be delivered in a way which is less intrusive on pricing discretion, does not involve time lags for variation of fees and is less labour intensive for government.

ALTERNATIVES TO THE APPROVAL PROCESS

An alternative means of delivering the benefits of the restrictions on pricing freedom would be to repeal the requirement that cemeteries and crematoria require prior approval of their fees and give the Minister (or the Secretary to the Department of Human Services) the power to investigate, disallow or give direction on fees that are unreasonable.

The adoption of this approach to cemetery and crematoria fees would be assisted by the introduction of requirements such as the following:

- That cemeteries and crematoria lodge a copy of their fees with the Department of Human Services annually.
- That cemeteries and crematoria advise the Department of Human Services of the introduction of any new fees.
- That cemeteries and crematoria advise the Department of Human Services of any increases in their fees that exceed increases in the consumer price index.

This approach would also be assisted by the Department of Human Services continuing its current practice of distributing model sets of fees that can be adopted by cemetery trusts. This practice is likely to be particularly useful as a guide to fee structuring that the Minister would consider reasonable. It would also be particularly useful for small cemetery trusts that may need assistance with pricing.

GAZETTAL IN THE GOVERNMENT GAZETTE

A serious concern with the requirement that fees of cemeteries and crematoria must be published in the Government Gazette is that the requirement does not achieve its objective of ensuring public accessibility of pricing information to aid fee comparisons. This is because most consumers do not read and may not even know where to locate a Government Gazette.

The fee gazettal requirement should be repealed as there are alternative means to ensure accessibility of pricing information that would be more effective.

ALTERNATIVES TO GAZETTAL IN THE GOVERNMENT GAZETTE

An option put forward in the Discussion Paper is to allow cemetery trusts to set their own fees on an annual or biannual basis with all metropolitan cemeteries and crematoria, and selected country operations, being required to publish their fees in metropolitan dailies on set dates. The advantages of this solution is described in the Discussion Paper as leaving cemetery trusts free to manage their operations, introducing an element of pricing competition and providing the public with information at a non emotional time.

This option is not favoured as the public accessibility of cemetery and crematoria pricing information published in a newspaper once or twice a year is questioned. Unless it is published at a time when someone in the family or a loved one is dying or has just died most consumers would take no notice. This proposal would really only benefit those preplanning a burial or cremation. Its accessibility would also be confined to those reading the newspaper on the set dates or those persons that can locate a copy of the paper printed on the set dates.

Another option would be for the Department of Human Services to annually publish compilations of fees of cemeteries and crematoria. It would greatly assist fee accessibility and fee comparisons if the Department of Human Services could publish a publication that sets out all the fees of all cemeteries and crematoria in the metropolitan area and a publication that sets out all the fees of all cemeteries and crematoria in the rest of Victoria. Availability of these publications on the Internet, at the offices of the Department of Human Services and through local governments would also significantly assist the accessibility of fees of cemeteries and crematoria.

Cemetery and crematoria fees would also be more accessible if every cemetery and crematoria is required to:

- Have a fee list available either at their premises or from the Secretary of their cemetery trust; and
- Provide consumers with a copy of their fee list when giving price quotations.

These requirements could be modelled on the US Federal Trade Commission's Funeral Rule.

The Discussion Paper suggests that comparison of fees charged at different cemeteries and crematoria is difficult because of the range of different terms cemetery trusts use to describe their fees. This difficulty could be overcome if industry could be encouraged to develop a common set of terms for core products and services for use in cemetery and crematorium price lists, quotes and accounts and if a requirement to use the common set of terms could be included in a code of practice developed by industry.

POSITION IN OTHER STATES AND TERRITORIES

In NSW, private operators have pricing discretion. The Governor does however have power under the Public Health Act 1991 to make regulations regulating the fees that may be charged for the cremation of human remains, for the preservation or disposal of ashes and for related services.

In the ACT, the Canberra Public Cemeteries Trust and the Norwood Park Crematorium currently have pricing freedom. The Minister does however have power under the Cemeteries Act 1933 to specify the matters in respect of which fees are payable and to determine the fee payable in respect of any specified matter. Under the Cremation Act 1966 the Executive has power to make regulations in relation to the fees payable to cremation authorities.

In South Australia, there is pricing freedom. The Local Government Act 1934 does however, give the Governor the power to make regulations regulating the maximum charges and fees which may be charged by a council for burial rights and other rights and services granted in respect of any cemetery under its care, control or management.

In Tasmania, the Cremation Act 1934 provides that a cremation authority may by public notice prescribe a scale of cremation fees.

In Queensland, the Funeral Benefit Business Act 1982 gives the Governor the power to make regulations regulating the matters for which fees are payable under the Act, regulating the amount of the fees, regulating the persons who are liable to pay fees, regulating when the fees are payable and regulating the recovery of unpaid amounts of fees.

In Western Australia, the Cemeteries Act 1986 sets out the purposes for which a Board may set cemetery or cremation fees or charges. Fees and charges do not require prior approval but must be gazetted. The Minister has power to amend or revoke a fee or charge set by a Board if the Minister considers the fee or charge to be unreasonable. Under the Cremation Act 1929 the Governor has the power to make regulations prescribing maximum fees and charges.

RECOMMENDATIONS

- That the limitation on the fees that can be charged by cemeteries be repealed.
- That cemeteries and crematoria be allowed to set their own fees without obtaining prior approval.
- That cemeteries and crematoria be required to lodge a copy of their full fee list with the Department of Human Services annually.
- That cemeteries and crematoria be required on an ongoing basis to advise the Department of Human Services of the introduction of any new fees.
- That cemeteries and crematoria be required on an ongoing basis to advise the Department of Human Services of any increases in their fees that exceed increases in the consumer price index.
- That the Minister or Secretary to the Department of Human Services have the power to investigate, disallow or give direction on fees that are unreasonable.
- That the Department of Human Services publish annually a publication which sets out the fees of all cemeteries and crematoria in the metropolitan area and a publication which sets out the fees of all cemeteries and crematoria in the rest of Victoria.

- That both fee publications be available on the Internet and be available at the offices of the Department of Human Services and through local governments.
- That the Department of Human Services continue to distribute model sets of fees which can be adopted by cemetery trusts.
- That publication of fees in the Government Gazette not be required.
- That all cemeteries and crematoria be required to have a full fee list available either at their premises or from the Secretary of their cemetery trust.
- That all cemeteries and crematoria be required when giving price quotations to provide consumers with a full fee list for all the products and services that they offer.
- That cemeteries and crematoria associations be requested to consult with their members to develop an agreed list of terms for core burial and cremation products and services.
- That the burial and cremation industry be encouraged to develop a code of practice, that incorporates the agreed list of terms and requires use of those terms in price lists, quotes and accounts to consumers.

ALTERNATIVES TO CURRENT REGULATION

NO REGULATION

This is inappropriate in the burial and cremation market for the reasons set out under the heading Why Should Cemeteries and Crematoria Be Regulated?

NEGATIVE REGULATION

A negative regulation system would allow free entry of participants into the burial and cremation market. It would provide protection by facilitating the removal of participants in the market who are found to be operating in an unacceptable manner.

It would also allow operational and pricing freedom that would be subject to the regulator's power to discontinue burials or cremations and to disallow unreasonable cemetery or crematorium fees.

Negative regulation is reactive rather than preventative. It is an unsuitable form of regulation for the burial and cremation market because of the potential risks to public health, to community safety, to public dignity, to the preservation of places of historical and social significance and to the interests of justice which unsuitable operators and inappropriate conduct could cause.

Negative regulation may however, be a suitable option for the regulation of fees of cemeteries and crematoria. It would allow pricing freedom and would also provide a means to deal with fees that are unreasonable.

SELF REGULATION

According to the Office of Regulatory Reform's Principles of Good Regulation self-regulation is a form of regulation that involves an industry association developing performance standards and codes of ethics and encouraging its members to comply with those standards and ethics. The standards developed by an industry association can be incorporated into a code of practice which has the advantage that it is much more flexible than legislation. It is most appropriate where there is sufficient power and commonality of interest within an industry to deter non-compliance and the costs of non-compliance are not significant.

As previously stated the multitude of stakeholders in the burial and cremation market, each with their own particular interests, means that there is no peak association that represents all participants in the burial and cremation market.

There is no association that could develop a code of practice that would be acceptable to the entire burial and cremation market and no association that has the power to demand compliance from the entire burial and cremation market.

Self regulation is also not appropriate in the burial and cremation market because the potential costs of non compliance with an industry code of practice to public health, community safety, the maintenance of public dignity, the preservation of places of historical and social significance and the interests of justice may be very high.

It is also an unsuitable form of regulation for the burial and cremation market as consumers are not in a position to assess whether operators are complying with industry standards or are cutting corners. In an article titled Ideas and Arguments About Public Health Law in a publication titled Public Health Law In Australia New Perspectives Chris Reynolds states at page 16 that:

Self regulation either directly by manufacturers regulating themselves or through associations or professional codes of practice are not obvious equivalents to regulation. For example, the Garibaldi case demonstrates that it was not a lack of knowledge that led to the outbreak; rather the company chose to cut corners in order to meet demand. No amount of self regulation can deal with a problem such as this. At best, self regulation complements but does not replace the traditional sanctions imposed under law.

There is a place for codes of practice within the burial and cremation market as a compliment to, rather than substitute for, legislative regulation.

COMMUNITY EDUCATION

The information asymmetries in the burial and cremation market are unlikely to be overcome by public education campaigns as most consumers consider that death is a long time away and do not take much interest in burial or cremation products and services.

Whilst public education campaigns would be insufficient to address the market failures in the burial and cremation market there is still some benefit in providing consumers, who are at the stage of making decisions to purchase burial and cremation products or services, with educational information that may be of assistance to them.

The publication of a brochure that provides basic information about the law in respect of burials and cremations and which advises consumers where to obtain pricing information for burial and cremation products and services would be beneficial to consumers in the burial and cremation market.

RECOMMENDATION

- That the Department of Human Services publish a brochure that provides basic information about the law in respect of burials and cremations and which advises consumers where to obtain pricing information for burial and cremation products and services.

LIST OF RECOMMENDATIONS

- That the position of the Victorian Government on tenure be clarified.
- That the Act recognise the special nature of land in which human remains are interred.
- That cremated remains that are interred be given the same tenure in the Act as human remains.
- That reuse of vaults and graves by the holder of the right of burial be retained in the Act in order to reduce the number of graves in Victoria, the cost of their maintenance and burial costs to the holder of a right of burial.
- That replacement of the cross subsidisation of cemeteries and crematoria be adopted as a long-term objective.
- That alternative funding sources for maintenance costs and for the propping up of economically unviable cemeteries be investigated.
- That the Act be amended to allow both burial and cremation of poor and destitute persons in order to lower the costs to government of the provision of this community service.
- That the restriction on vertical integration of the death care market in Victoria which prevents funeral directors and others in the death care industry operating cemeteries and crematoria be retained.
- That the sale of cemeteries and crematoria with memorial sites be prohibited.
- That cemeteries remain within the public sector.
- That crematoria which include memorial sites for interred ashes remain in the public sector.
- That the Department of Human Services consult with industry to determine whether stand alone crematoria facilities without memorial sites are feasible in Victoria as commercial entities and whether such crematoria would be of interest to the private sector.
- That if private crematoria without memorial sites are found to be commercially feasible and attractive to the private sector in Victoria, the private sector be allowed to operate such facilities if a planning permit is obtained, subject to satisfaction of licensing criteria.
- That private operators continue to be excluded from the cremation market until a suitable alternative to cross subsidisation of cemeteries and crematoria is investigated and implemented.
- That licensing criteria for the provision of stand alone incineration facilities include consideration of whether the persons who are to operate the facility are fit and proper, whether they are capable of operating the facility at an appropriate standard and whether the proposed facility and its equipment are suitable to protect public health, public dignity and the environment.
- That criteria for the appointment of members of cemetery trusts be set out in the Act and require some members of the cemetery trust to have management, accounting or business skills and expertise.

- That consideration be given to merging some of the smallest cemetery trusts where there are other local cemetery trusts operating in close proximity.
- That a power for the Secretary to the Department of Human Services to contract out the operation of a cemetery be provided. This would give the Secretary the option of exploring contracting out arrangements as an alternative to giving responsibility for an uneconomically viable cemetery to another cemetery trust to administer.
- That contracted cemetery or crematorium providers have all the powers and obligations of a cemetery trust.
- That the restriction in the Act prohibiting the conduct of burials and cremations outside a cemetery unless the consent or approval of the Secretary to the Department of Human Services is obtained be retained.
- That restrictions which are aimed at reducing public health risks (eg that graves and vaults must be water tight) be retained.
- That the power to discontinue burials and cremations by order be retained.
- That the requirement of a licence for use of a right of burial where there is an order that burial in a cemetery should be discontinued be repealed.
- That the approval process for the conversion of cemeteries into pioneer memorial parks be retained.
- That the restriction in the Act that only the cemeteries listed in the Fourth Schedule of the Act can be converted into pioneer memorial parks be repealed.
- That the restriction on where a crematorium can be constructed be repealed and included in planning legislation.
- That the restriction that bodies are not to be buried without a burial permit and without the production of prescribed documents be retained.
- That the restriction that bodies are not to be cremated without permission to cremate and without the production of prescribed documents be retained.
- That consideration be given to removing the cremation forms in the Third Schedule of the Act and including them in regulations. This would remove the need for the Act to be amended every time a change to the forms is required.
- That the dual certification requirements by two medical practitioners be retained.
- That the licensing requirement for medical practitioners who sign Part B of the cremation consent form be repealed.
- That requirements in respect of the registration of burials and cremations be retained.
- That the licensing process for exhumations be retained.
- That the requirement to pay a fee for an exhumation licence be retained.
- That the limitation on the fees that can be charged by cemeteries be repealed.
- That cemeteries and crematoria be allowed to set their own fees without obtaining prior approval.
- That cemeteries and crematoria be required to lodge a copy of their full fee list with the Department of Human Services annually.
- That cemeteries and crematoria be required on an ongoing basis to advise the Department of Human Services of the introduction of any new fees.
- That cemeteries and crematoria be required on an ongoing basis to advise the Department of Human Services of any increases in their fees that exceed increases in the consumer price index.
- That the Minister or the Secretary to the Department of Human Services have the power to investigate, disallow or give direction on fees that are unreasonable.

- That the Department of Human Services publish annually a publication which sets out the fees of all cemeteries and crematoria in the metropolitan area and a publication which sets out the fees of all cemeteries and crematoria in the rest of Victoria.
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- That the burial and cremation industry be encouraged to develop a code of practice that incorporates the agreed list of terms and requires use of those terms in price lists, quotes and accounts to consumers.
- That the Department of Human Services publish a brochure that provides basic information about the law in respect of burials and cremations and which advises consumers where to obtain pricing information for burial and cremation products and services.

REFERENCES

Australian Bureau of Statistics. *Population Projections 1997 to 2051*, Australian Bureau of Statistics, Canberra, 1998.

Australian Bureau of Statistics. *Deaths*, Australian Bureau of Statistics, Canberra, 1998.

Australian Cemeteries and Crematoria Association Limited. *Environmental Guideline for Crematoria and Cremators*, October 1995.

Australian Cemeteries and Crematoria Association Limited. *Crematoria and Cremators Code of Ethics*.

BDO Consulting Pty Ltd. *Cemeteries of Victoria Central Maintenance Fund Project Final Report*, 1999 (*unpublished*).

Cemeteries Act Review Reference Group, *Future Directions for Cemeteries Legislation*, October 1997 (*unpublished*).

Centre for International Economics. *National Competition Policy Review of ACT Cemeteries and Crematoria. Issues and Options Paper*, 1999.

Centre for International Economics. *National Competition Policy Review of ACT Cemeteries and Crematoria*, 1999.

Department of Human Services. *Regulatory Impact Statement for the Proposed Cemeteries Regulations 2000*.

Department of Human Services *The Changing Role of Cemeteries A Discussion Paper Cemeteries Act Review*, 1996.

Department of Premier and Cabinet. Competition Policy Task Force. *National Competition Policy: Guidelines for the Review of Legislative Restrictions on Competition*, Victorian Government, Melbourne, 1996.

Fawkner Crematorium and Memorial Park. *Annual Report*, 1999.

Federal Trade Commission U.S. *Funerals: A Consumer Guide*, 1992.

Fisher, D. Buried Trouble. *Forbes* 18 September 2000: 84.

Horn, M. The Goliaths Of The Funeral Industry Are Making Lots Of Money Off Your Grief, *US News*, 1998.

Lawrie, Groom & Company. *Cemeteries and Crematoria Association of Victoria. Survey of 1996-1997 Annual Reports.*

Lynch, T. *Bodies In Motion And At Rest*, UK, 2000.

Mitford, J. *The American Way Of Death Revisited*, NY, 2000.

Mortuary Industry and Cemeteries Administration Committee. *Review of Cemeteries Legislation, Discussion Paper*, 1986.

New York City Consumer Affairs. Growing Monopolization In The Funeral Industry Has Consumers Paying A High Price For Dying. DCA Report Says, *Press Release*, 11 February 1999.

Port Philip/Caulfield Leader Life Stories Writ in Stone, 27 November 2000.

Preece, A.A. The Law Relating to Burial and Crematoria, *Annual Conference of the Australian Cemeteries and Crematoria Association Ltd*, 1991.

Reynolds, C. Ideas And Arguments About Public Health Law. In Australian Institute Of Health Law And Ethics. *Public Health Law in Australia - New Perspectives*, 1998: 1-23.

Sagazio, C. Cemeteries. *Our Heritage*, 1992.

Shoebridge, N. The Dying Game. *Business Review Weekly*, 1998.

Submissions to the Department of Human Services. The Changing Role of Cemeteries A Discussion Paper. Cemeteries Act Review, December 1996.

The Bayside Advertiser. Crematorium "Not Needed". 1 May 2000.

The Herald Sun, Cemetery May Scatter Ashes, 8 October 2000.

The Necropolis. *Annual Report*, 1999.

United Kingdom House of Commons Hansard Debates for 5 June 1991.

United Kingdom House of Commons Hansard Debates for 16 June 1990.

United Kingdom House of Commons Hansard Debates for 21 May 1998, Pt 27 Column 1182-1187.

Victorian Lower House Hansard Debates for 13 April 1995: 833

Victorian Lower House Hansard Debates for 24 May 2000 in respect of Faulkner Crematorium and Memorial Park.

Internet Resources

ABC News Online. Funeral Ownership Politics, August 1999.

BBC Bristol Online News. Cemetery May Have A More Settled Future, June 2000.

Bryce, R. Politics: SCI: One Foot in the Grave, *The Austin Chronicle* 2000.

Bryce, R. Politics – A Grave Injustice, *The Austin Chronicle* 2000

California Public Interest Research Group. *Consumer Press Index website*.

New Report Warns Off Funeral Home Rip-Offs, 1998.

History Of The Funeral Industry.

Funeral Homes: Problems In The Funeral Industry.

Funeral Homes: Findings Of Investigation.

Funeral Homes: Why Are Prices So High?

An Invitation To Funeral Pricing Abuse.

Press Release AG Settles NYC Funeral Home Monopoly Case.

Cohen, Milstein, Housfeld & Tollis. E-Journal. PLLC Files Class Action Suit Against Stewart Enterprises Inc.

Consumer Law Page (US website). Cremations And Funerals, Consumer Rights.

Consumerama (US Website). Undying Greed.

Department of Consumer Affairs, New York Funeral Report *Press Release*.

Federal Trade Commission. Service Corporation International Divests, Roswell, New Mexico Funeral Home As Part Of FTC Settlement. *Press Release*.

Fisher, D. Grave Dancer *Forbes*.

Funerals and Rip Offs (US website).

Gazis-Sax, J. A Brief History Of Cemeteries, 1996.

LA Funeral Societies. Crematory To Reopen Under New Management.

Loewen Group. The Loewen Group Files For Chapter 11 In US And CCAA In Canada To Facilitate Restructuring, *Press Release* 1 June 1999.

Marlow, J. Commentary *Channel Four News*, 22 August 1995.

Roberts, DJ. Loewen's Cemetery Shakedown *Profits of Death*, April 2000.

Saving Graves. *Homepage*.

Smith, RGE.. *Submission to the US Federal Trade Commission on the Trade Regulation Rule On Funeral Industry Practices Commission On Behalf Of International Cemetery And Funeral Association.*

State of California Department of Consumer Affairs *Press Releases.*

State Requests Immediate Suspension Of Contra Costa Crematory, Funeral Homes, July 1998.

LA Funeral Societies, Crematory To Reopen Under New Management Pending Sale, May 1998.

Cemeteries And Funeral Bureau Revotes AAA Cremation Services, April, 2000.

Cemetery Funeral Bureau Obtains Interim Suspension Order Against Woodlawn Cemeteries In Compton, March 2000.

Submissions to the US Federal Trade Commission on the Trade Regulation Rule on Funeral Industry Practices.

US News On Line. Opting Out of a Home Funeral for Her Husband.

APPENDIX 1
THE CEMETERIES ACT REVIEW PANEL

Appendix 1

Review Panel

Ms Susie Goldman – Chair

Ms Goldman is a Barrister and Solicitor of the Supreme Court of Victoria and is employed by the law firm Collins and Collins. Collins and Collins was engaged on a consultancy basis to participate in national competition policy reviews of the Therapeutic Goods(Victoria) Act 1994 and the Cemeteries Act 1958. It was also engaged to assist with the broader framework of review under the National Public Health Partnership Legislative Reform Working Group. Ms Goldman has been employed as a Legal Officer with the Department of Human Services and the Office of Fair Trading and has also been employed as a solicitor in private practice. Ms Goldman has extensive experience in the review of legislation, the provision of advice and the conduct of litigation. She was a member of the review panel that undertook the national competition policy review of the Therapeutic Goods(Victoria) Act 1994.

Ms Goldman is not, at present, engaged in the operation or regulation of the matters regulated under the Cemeteries Act 1958 or its regulations and therefore satisfies the independence requirements of the In-House Review model contained in the Guidelines.

Dr Jacqueline Goodall

Dr Goodall is employed as a Legislation Officer with DHS. Dr Goodall has previously been employed as Senior Legislation Officer with the Health Department of Western Australia. Responsibilities in this position included detailed research, development and review of Health legislation. Dr Goodall is currently on secondment to the Public Health Division to assist in the review of public health legislation for the purposes of National Competition Policy and as part of the broader framework of review under the National Public Health Partnership Legislative Reform Working Group.

Dr Goodall is not, at present, engaged in the operation or regulation of the matters regulated under the Cemeteries Act 1958 or its regulations and therefore satisfies the independence requirements of the In-House Review model contained in the Guidelines.

Ms Carmel Benham

Ms Benham is a Barrister and Solicitor of the Supreme Court of Victoria and has been employed as a Legal Officer with DHS since 1992. Ms Benham's responsibilities have included the provision of advice to the Department on a wide range of matters and the amendment of a number of pieces of legislation administered by the Department. Ms Benham is currently on secondment to the Public Health Division to assist in the reviews of a number of Public Health Acts for the purpose of National Competition Policy and as part of the broader framework of review under the National Public Health Partnership Legislative Reform Working Group.

Ms Benham is not, at present, engaged in the operation or regulation of the matters regulated under the Cemeteries Act 1958 or its regulations and therefore satisfies the independence requirements of the In-House Review model contained in the Guidelines.

APPENDIX 2
THE CEMETERIES ACT
NATIONAL COMPETITION POLICY
TERMS OF REFERENCE

Government of Victoria
National Competition Policy Review of Legislative Restrictions on Competition

REVIEW OF THE CEMETERIES ACT

Terms of Reference

The review of the CEMETERIES ACT 1958 has been commissioned by the Minister for Health in accordance with the *Victorian Government Timetable for the Review and Reform of Legislation that Restricts Competition*, determined in accordance with National Competition Policy.

Legislation to be reviewed

The review will examine the case for reform of legislative restrictions on competition contained in the Cemeteries Act 1958 in accordance with the *Victorian Government's Guidelines for the Review of Legislative Restrictions on Competition*.

In particular the review panel will

- Clarify the objectives of the legislation;
- Consider the general efficiency and effectiveness of the legislation;
- Identify the nature of the restrictions on competition;
- Analyse the likely effect of the restrictions on competition and on the economy in general;
- Assess and balance the costs and benefits of the restrictions; and
- Consider alternative means of achieving the same result including non-legislative means.

Reform Options

Without limiting the scope of the review, the review will specifically address the appropriateness of regulating cemeteries and crematoria within the public or private domain, the appropriateness of regulating miscellaneous matters relating to public health and high standards of public dignity and the requirement to regulate fees and charges. The review will also consider the way in which the regulation of fees and charges should occur.

Review Arrangements

This review is to be established and conducted in accordance with the In – House review model contained in the Guidelines.

Key Dates

The review will report its findings and recommendations to the Minister by 31 December 2000

Secretariat

The review secretariat will be located in the Department of Human Services. The Secretariat can be contacted on:

Phone	9637 5040
Fascimile	9637 4695
Address	Level 18, 120 Spencer Street Melbourne
Postal	Legislation Review Public Health Division Department of Human Services GPO Box 1670N Melbourne 3000

