

TASMANIA

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**PREPAID FUNERALS BILL 2004**

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**SCHEDULE 1 – CONSEQUENTIAL AMENDMENTS**

# **PREPAID FUNERALS BILL 2004**

*(Brought in by the Minister for Justice and Industrial Relations, the Honourable Judith Louise Jackson)*

## **A BILL FOR**

**An Act to regulate the provision of prepaid funeral services and to make consequential amendments to the *Consumer Affairs Act 1988***

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

## **PART 1 - PRELIMINARY**

### **Short title**

1. This Act may be cited as the *Prepaid Funerals Act 2004*.

### **Commencement**

2. This Act commences on a day to be proclaimed.

### **Interpretation**

3. In this Act, unless the contrary intention appears –

“**auditor**” means an auditor who is –

- (a) a registered company auditor within the meaning of the Corporations Act; and
- (b) a member of –
  - (i) the Institute of Chartered Accountants; or
  - (ii) the Australian Society of Certified Practising Accountants; or
  - (iii) the National Institute of Accountants;

**“contributor”** means a person who enters into a prepaid funeral agreement either for his or her own benefit or the benefit of another person;

**“custodian”** means a person appointed to manage the business of a funeral trust;

**“Director”** means the Director of Consumer Affairs and Fair Trading;

**“funeral business”** means a business in the course of which funeral services are supplied or arranged;

**“funeral services”** means the provision of –

- (a) all or part of any funeral, burial or cremation service; or
- (b) all or part of any services connected with funeral, burial or cremation services –

and includes –

- (c) the attendance of a person to assist with arrangements for a funeral, burial or cremation; and

- (d) the attendance of a person to assist with the preparation of associated documents and notices; and
- (e) the transportation of the body of a deceased person; and
- (f) the use of mortuary facilities or services; and
- (g) the supply of any goods including a coffin or casket; and
- (h) the arrangements made for burial or cremation of a deceased person; and
- (i) the provision of a mobile graveside chapel; and
- (j) the provision of a lowering device for a coffin or casket; and
- (k) the preparation of the ashes of a deceased person awaiting inurnment and memorial arrangements;

**“funeral trust”** means a funeral trust established under section 10;

**“GST”** has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth;

**“person”** includes a partnership;

**“prepaid funeral agreement”** means an agreement to supply funeral services, for payment or other valuable consideration, which is made before the death of the recipient;

**“recipient”** means a person for whom funeral services are intended to be provided;

**“regulations”** means regulations made and in force under this Act;

**“relationship status”** means the status of being married or in a significant relationship, within the meaning of the *Relationships Act 2003*, or in a caring relationship which is the subject of a deed of relationship registered under Part 2 of that Act;

**“transferee”** means a person carrying on a funeral business to which the rights and obligations arising from another funeral business are transferred.

### **Application of Act**

#### **4. This Act applies to –**

- (a) all prepaid funeral agreements made after the commencement of this Act; and
- (b) certain prepaid funeral agreements made before that commencement as mentioned in section 6.

**PART 2 – DISCLOSURE OF PRE-CONTRACTUAL  
INFORMATION**

**Disclosure of information before prepaid funeral agreement**

**5. (1)** Subject to subsection (3), a person carrying on a funeral business must not make a prepaid funeral agreement unless he or she first provides to the contributor and the recipient the following information:

- (a) the name, including the business name if any, and the address where the funeral business is carried on;
- (b) the name of the contributor and the usual residential address of the contributor;
- (c) the name of the recipient and the usual residential address of the recipient;
- (d) the name of the prepaid funeral trust to which payments are to be made;
- (e) full details of each funeral service to be supplied, including details of all goods, services and facilities to be supplied in connection with that funeral service and the cost of each of those goods, services and facilities;
- (f) the due date for any payment or other valuable consideration in respect of the funeral services by the contributor and how the payment or consideration is to be made or given;
- (g) where payments under the agreement are to be made by instalment, the amount of each

instalment and the date on which each instalment is due;

- (h) any terms or conditions applying to the conduct of the funeral or to the provision of other funeral services;
- (i) any fees, brokerage or commission payable to the funeral business or to any other person;
- (j) the amount of any GST or other amount payable by law by virtue of the agreement;
- (k) any other information prescribed by the regulations.

**(2)** A person must not provide any information required under subsection (1) that is incorrect in a material particular.

Penalty: Fine not exceeding 50 penalty units.

**(3)** A person is not required to provide any information mentioned in subsection (1) to a recipient if –

- (a) an enduring power of attorney granted by the recipient to the contributor is in force; or
- (b) the contributor is a person responsible for the recipient within the meaning of section 4 of the *Guardianship and Administration Act 1995*.

**PART 3 – PREPAID FUNERAL AGREEMENTS*****Division 1 – Prepaid funeral agreements*****Pre-existing prepaid funeral agreements**

**6. (1)** Within 6 months after the commencement of this Act, a person carrying on a funeral business must notify the Director in writing of all prepaid funeral agreements that have been made in the course of that business before the commencement of this Act, unless funeral services have been supplied under the agreement.

Penalty: Fine not exceeding 10 penalty units.

**(2)** A notification under subsection (1) is to be in a form approved by the Director.

**Prepaid funeral agreements**

**7. (1)** A person must not make a prepaid funeral agreement unless it is made in accordance with this Act.

Penalty: Fine not exceeding 50 penalty units.

**(2)** A prepaid funeral agreement is to be in writing, signed by each party to the agreement, and is to contain any information required by section 5(1), which information may form part of the agreement or may be given in a separate document at the time when the agreement is made.

**(3)** If any of the required information is set out in an attachment to the agreement, reference is to be made in the agreement to the attachment.

(4) Within 14 days after making the agreement, the person carrying on the funeral business must give a copy of the signed agreement to the contributor.

Penalty: Fine not exceeding 10 penalty units.

(5) The agreement is to be printed in a font size of at least 10 points.

(6) Any provision in a prepaid funeral agreement which permits the price for any funeral services to be increased is void.

(7) Subsection (6) does not prevent the provision of additional funeral services for which additional charges are payable.

### **Termination of prepaid funeral agreement**

**8. (1)** A contributor may, by notice in writing to a person carrying on a funeral business, terminate a prepaid funeral agreement on any of the following grounds:

- (a) that the recipient has ceased to be ordinarily resident in Tasmania;
- (b) that the relationship status of the recipient has changed;
- (c) that in the opinion of the Director it is unreasonable in all the circumstances that the agreement should continue in force;
- (d) that the continued payment of instalments would cause serious hardship for the contributor;

- (e) that the funeral business has ceased to carry on business and is unable to provide the funeral services;
- (f) that funeral services have already been supplied in respect of the recipient.

**(2)** A person carrying on a funeral business may, by notice in writing to the contributor, terminate a prepaid funeral agreement on either of the following grounds:

- (a) that the funeral business has ceased to carry on business;
- (b) that the funeral business is unable to provide the funeral services for reasons that were not reasonably foreseeable at the time the agreement was made.

**(3)** On application by a person carrying on a funeral business, the Director may terminate a prepaid funeral agreement if he or she is satisfied that in all the circumstances it is unreasonable for the agreement to be performed.

### ***Division 2 – Funeral trusts***

#### **Duty to deposit payments into funeral trust**

**9.** Within 14 days after receiving any money under a prepaid funeral agreement, a person carrying on the funeral business must deposit that money in a funeral trust approved by the Director.

Penalty: Fine not exceeding 100 penalty units.

**Requirements for funeral trusts**

**10. (1)** A funeral trust may be established for the purposes of 2 or more funeral businesses.

**(2)** The terms of the funeral trust are to be approved by the Director who may impose conditions on the approval if he or she considers it necessary or expedient to do so for the purposes of this Act.

**(3)** The Director may revoke an approval if satisfied that –

- (a) an offence against this Act has, or may have, been committed or is likely to be committed; or
- (b) an investigation is being, or is to be, conducted into the funeral trust and the Director considers it appropriate to revoke the approval; or
- (c) a condition of the approval has not been complied with.

**(4)** On the revocation of an approval, the Director must notify the custodian of the funeral trust and any person who has deposited money with the trust of the revocation and the reasons for it.

**Appointment of custodian**

**11. (1)** A funeral trust is of no effect unless it provides for the appointment of a custodian to act as manager of the trust's business.

**(2)** The custodian must not have any interest in any funeral business that is a beneficiary of the funeral trust and the custodian must not otherwise be a beneficiary of the trust.

**(3)** The responsibilities of the custodian are to ensure –

- (a) that payments by the funeral trust are made only in accordance with this Act and a prepaid funeral agreement; and
- (b) that funds held by the funeral trust are invested in accordance with the *Trustee Act 1898*; and
- (c) that the funeral trust is administered in accordance with this or any other Act.

**(4)** The custodian must ensure that all investments made or held by the funeral trust are made or held in the name of the custodian on behalf of the funeral trust unless otherwise authorised by the Director.

Penalty: Fine not exceeding 10 penalty units.

### **Register of funeral trusts**

**12. (1)** The Director is to maintain a register of all funeral trusts approved under this Act.

**(2)** The register is to contain such particulars of the funeral trust as the Director thinks fit and is to be available for public inspection at the office of the Director at all times during normal business hours without charge.

**(3)** If –

- (a) approval of a funeral trust is revoked under section 10(3); or
- (b) any person concerned in the management of a funeral trust is convicted of an offence against

this Act or any other offence involving dishonesty –

the Director may remove particulars of the funeral trust from the register.

### **Duty of funeral trust to refund payments**

**13. (1)** Where a prepaid funeral agreement is terminated under this Act, a person carrying on the funeral business must immediately notify the custodian of the relevant funeral trust of the termination.

**(2)** On receiving notification, the custodian must make any payments to a contributor as are required by this Act within 14 days or any longer period allowed by the Director, less –

- (a) any reasonable costs as prescribed by the regulations; and
- (b) any amounts properly payable to the funeral business.

Penalty: Fine not exceeding 5 penalty units.

### **Investments of funeral trust**

**14. (1)** A custodian must invest in accordance with the *Trustee Act 1898* any money paid, or any other valuable consideration received, in respect of the funeral trust.

Penalty: Fine not exceeding 50 penalty units.

**(2)** The value of any investment made by the funeral trust, including the amount invested and any earnings, dividends or interest on that investment, is the property of

the funeral trust and in any accounting of the value of the funeral trust is to be apportioned at least once each year.

**(3)** A person who is not the custodian or acting on the authority of the custodian may not authorise investments, payments, withdrawals or transfer of any assets or investments of the funeral trust.

Penalty: Fine not exceeding 50 penalty units.

### **Payments from funeral trust**

**15. (1)** The custodian of a funeral trust must not pay any money out of the funeral trust unless the payment is made –

- (a) to a person carrying on a funeral business for provision of funeral services under a prepaid funeral agreement following the death of the recipient; or
- (b) to the contributor on the termination of a prepaid funeral agreement in accordance with this Act; or
- (c) for reasonable expenses incurred by the custodian in the administration of the funeral trust and investments of the funeral trust; or
- (d) for charges by the custodian in accordance with a scale approved by the Director for the administration of the funeral trust; or
- (e) in accordance with section 23(2).

Penalty: Fine not exceeding 100 penalty units.

**(2)** The custodian of a funeral trust must not make a payment from the funds of the funeral trust otherwise than in accordance with this Act.

Penalty: Fine not exceeding 100 penalty units.

**(3)** Where an offence has been committed in respect of the payment of money from a funeral trust, a magistrate may, on the application of a contributor, custodian or other interested person, direct such reimbursement of the funeral trust as would be required to restore –

- (a) any payments improperly made from the trust; and
- (b) any other loss to the trust that arose from that improper payment.

**(4)** Where a payment out of a funeral trust is made following the death of a recipient, the custodian must make the payment to the person carrying on the relevant funeral business but the amount paid is not to exceed an amount required for –

- (a) the funeral business to provide the funeral services required under the prepaid funeral agreement; and
- (b) any additional amount of GST payable for goods or services provided under the agreement.

**(5)** Where a payment out of a funeral trust is required following termination of a prepaid funeral agreement in accordance with this Act, the payment is to be made to the contributor and is to include an amount representing a reasonable proportion of the value of the funeral trust, having regard to the time that the funds have been deposited in the funeral trust.

**(6)** Where a payment is made to a transferee in accordance with this Act, the payment is to be the same amount as would have been payable if the contributor had terminated the agreement.

***Division 3 – Duties of funeral businesses and custodians***

**Insolvency of funeral business**

**16.** If –

- (a) a person carrying on a funeral business becomes insolvent or ceases to carry on that business; and
- (b) the obligations under prepaid funeral agreements made by that funeral business are not transferred to another funeral business –

the custodian of the relevant funeral trust must transfer all the property and investments of the funeral trust that relate to the first-mentioned funeral business to the contributors in accordance with this Act.

Penalty: Fine not exceeding 100 penalty units.

**Duty to maintain register**

**17. (1)** The custodian of a funeral trust must maintain a register of prepaid funeral agreements under which payments are made to the funeral trust which records –

- (a) the name and address of each contributor; and
- (b) the name and address of each recipient; and

- (c) the date on which each payment was received by a person carrying on a funeral business from a contributor and the amount of each payment; and
- (d) the name of another funeral trust to which any money or valuable consideration received under a prepaid funeral agreement by a person carrying on a funeral business is paid or transferred; and
- (e) the date when the agreement is terminated or transferred or the date when the funeral services are supplied in respect of the recipient.

**(2)** The custodian of any funeral trust must maintain proper accounts for the funeral trust showing –

- (a) the name of the trust account and the name of the institution at which the trust account is held; and
- (b) all investments made on behalf of the funeral trust and income, dividends or other earnings received in respect of those investments; and
- (c) all money and any other consideration received by the custodian in respect of each contributor; and
- (d) expenses incurred by the custodian in the administration and investments of the funeral trust; and
- (e) payments from the funeral trust that are made on the performance of a prepaid funeral agreement or on the termination or transfer of the agreement under this Act; and

- (f) any other accounting records normally required to be kept by a trustee.

Penalty: Fine not exceeding 50 penalty units.

### **Value of funeral trust**

**18. (1)** In this section –

“**Actuary**” means a person who is a Fellow of the Institute of Actuaries (Australia) or another suitable person who is, in either case, approved by the Director.

**(2)** On request by the Director, the custodian of a funeral trust must cause the value of the funeral trust to be determined by an Actuary.

Penalty: Fine not exceeding 50 penalty units.

**(3)** The Actuary must determine the total value of the assets and the future and contingent liabilities of the funeral trust and provide a report to the custodian and the Director accordingly.

### **Annual returns**

**19. (1)** A person carrying on a funeral business must before 31 December in each year lodge with the Director a return for the period ending on 30 June in that year stating –

- (a) the total number of prepaid funeral agreements that he or she has made where the funeral services have not yet been supplied; and

- (b) the name and location of any funeral trust into which payments under those agreements have been made; and
- (c) the total amount of all contributions by the funeral business to the funeral trust.

**(2)** The custodian of a funeral trust must before 31 December in each year lodge with the Director an annual return for the previous financial year including –

- (a) a statement of the value of the funeral trust and an estimate of the future and contingent liabilities of the funeral trust or, where requested by the Director under section 18(2), the value of the funeral trust and an estimate of the future and contingent liabilities of the funeral trust as determined under section 18(3); and
- (b) a report by an auditor in respect of the funeral trust stating whether the custodian has, in the opinion of the auditor, kept proper accounting records in respect of the funeral trust and has maintained a register in accordance with section 17; and
- (c) such statements as in the opinion of the auditor are adequate to explain the financial transactions of the funeral trust both during and at the end of that financial year and the financial position of the funeral trust at the end of that financial year.

Penalty: Fine not exceeding 100 penalty units.

**Copy of records**

**20.** A person carrying on a funeral business must keep copies of –

- (a) all prepaid funeral agreements; and
- (b) all records relating to payments by contributors under the agreements –

for a period of not less than 5 years after the agreement is performed or terminated.

**Death of recipient before completion of payments under agreement**

**21. (1)** Where a prepaid funeral agreement provides for payment by instalments and the recipient dies before the payment of the final instalment, the person carrying on the funeral business must supply funeral services as if the final instalment had been made.

Penalty: Fine not exceeding 50 penalty units.

**(2)** Subsection (1) does not affect the liability of any personal representative of the recipient for any amount due under the agreement.

**Director may require audit**

**22. (1)** If the Director believes it appropriate to do so, the Director may, by notice in writing given to a person carrying on a funeral business or a custodian, require the person or custodian to conduct an audit of a funeral trust within 28 days after the notice is given and at the expense of the funeral trust.

**(2)** An audit required by the Director under subsection (1) is to provide such information as the Director considers appropriate to satisfy the purposes of this Act.

**(3)** A person carrying on a funeral business or a custodian must comply with the requirements of this section.

Penalty: Fine not exceeding 100 penalty units.

**PART 4 – MISCELLANEOUS AND SUPPLEMENTAL****Transfer of rights and obligations**

**23. (1)** Where payments under a prepaid funeral agreement are held by a funeral trust, a person carrying on the relevant funeral business may assign his or her rights and obligations under the agreement to another funeral business.

**(2)** On an assignment under subsection (1), the custodian of the relevant funeral trust must –

- (a) continue to act as custodian of that funeral trust in respect of the relevant prepaid funeral agreement; or
- (b) pay all money and transfer all investments held in respect of the agreement to the custodian of another funeral trust nominated by the person carrying on the first mentioned funeral business.

**Disputes about payment of funds**

**24.** In the event of any dispute arising on the termination of a prepaid funeral agreement or otherwise under the agreement or arising from any payments out of a funeral trust or the provision of funeral services, a magistrate may, on the application of a contributor, recipient or personal representative of a recipient, make –

- (a) an order for the payment of money from a funeral trust; and
- (b) any consequential orders that the magistrate considers appropriate.

**Restriction on withdrawal of funds****25. (1) If –**

- (a) the Director has reason to believe that a funeral trust is not being managed in a manner consistent with this Act; or
- (b) a custodian or a person carrying on a funeral business has contravened this Act; or
- (c) a requirement for a return under this Act has not been met and it is desirable to prohibit payment from a funeral trust during the course of an investigation –

the Director may make an order preventing any further withdrawal of money from any account or investment held in respect of the funeral trust or the funeral business for such time as he or she thinks fit.

**(2)** A person carrying on a funeral business or a custodian must comply with an order made under this section.

Penalty: Fine not exceeding 100 penalty units.

**Liability for offences against Act**

**26. (1)** Where there is a contravention of a provision of this Act by a funeral business, the person carrying on the funeral business may be convicted of an offence against that provision unless he or she satisfies the court that the act or omission constituting the offence took place without his or her knowledge or consent.

**(2)** Where a body corporate is charged with an offence against this Act, a director of the body corporate or any other person who is concerned with, or takes part in,

the management of the body corporate may be charged with the same offence and, if the body corporate is convicted of the offence, any person charged with the same offence under this section may be convicted of that offence unless he or she satisfies the court that the act or omission constituting the offence took place without his or her knowledge or consent.

### **Investigations**

**27.** An authorized officer, within the meaning of the *Fair Trading Act 1990*, has the same powers for entry to premises and obtaining documents and other information as are conferred by sections 30 and 31 of that Act, and the offences and penalties provided by section 32 of that Act apply.

### **Regulations**

**28. (1)** The Governor may make regulations for the purposes of this Act.

**(2)** Without limiting the generality of subsection (1), the regulations may –

- (a) provide for the obligations of the custodian of a funeral trust to make a payment as required under section 13; and
- (b) exempt a deposit scheme or class of deposit schemes which are subject to alternative prudential regulation from the application of this Act or any provision of this Act; and
- (c) exempt a class of prepaid funeral agreements from the application of any provision of this Act where payments under the agreements are

to be made into a deposit scheme that is exempted under paragraph (b); and

- (d) exempt a person carrying on a funeral business from the application of any provision of this Act for a specified period.

### **Administration of Act**

**29.** Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* –

- (a) the administration of this Act is assigned to the Minister for Justice and Industrial Relations; and
- (b) the department responsible to that Minister in relation to the administration of this Act is the Department of Justice.

### **Consequential amendments**

**30.** The legislation specified in Schedule 1 is amended as specified in that Schedule.

**SCHEDULE 1 – CONSEQUENTIAL AMENDMENTS**

Section 30

***Consumer Affairs Act 1988***

1. Section 3A is amended by inserting “, the *Prepaid Funerals Act 2004*” after “Consumer Credit (Tasmania) Code”.
2. Section 16 is amended as follows:
  - (a) by inserting in subsection (3) “, the *Prepaid Funerals Act 2004*” after “Consumer Credit (Tasmania) Code”;
  - (b) by inserting in subsection (4) “, the *Prepaid Funerals Act 2004*” after “Consumer Credit (Tasmania) Code”.