

TASMANIA

PREPAID FUNERALS BILL 2003

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PREPAID FUNERALS BILL 2003

(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 2003*.

Commencement

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

Interpretation

3. In this Act, unless the contrary intention appears –
 “approved” means approved by the Director;

“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 but does not include cemetery sales of burial plots, mausoleum sites or inurnment sites;

“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 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 11;

“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;

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

Objects of Act**4. The objects of this Act are –**

- (a) to protect the interests of persons who pay in advance for intended funeral services for a living person –
 - (i) by requiring that agreements for the prepayment of funeral services are to be in writing and to meet certain minimum standards; and
 - (ii) by determining the persons who may enter into an agreement for the prepayment of funeral services on behalf of any person; and
 - (iii) by requiring disclosure of certain information before any such agreement is made; and
 - (iv) by providing for the cancellation of such agreements in certain circumstances and for the refund of payments or the transfer of obligations to provide funeral services and rights to prepaid money; and
- (b) to protect the money paid by any person –
 - (i) by requiring the establishment of funeral trusts for managing prepaid money for funerals; and
 - (ii) by requiring all prepaid money to be paid into a trust account managed by a funeral trust; and

- (iii) by requiring the appointment of a custodian to administer each funeral trust; and
- (iv) by providing for the application of surplus money from funeral trusts; and
- (v) by requiring that funeral businesses and funeral trusts provide annual audited returns to the Director specifying the number of prepaid funeral agreements for which the businesses and trusts are responsible, and the activities and investments of the trusts.

Application of Act

5. (1) Subject to subsection (2), this Act applies to all prepaid funeral agreements whether entered into before or after the commencement of this Act.

(2) In the case of a prepaid funeral agreement entered into before the commencement of this Act –

- (a) sections 7, 8(6) and (7), 9, 16 to 19 (both inclusive) and 21 to 29 (both inclusive) apply to the agreement on and after that commencement; and
- (b) the remaining provisions of this Act apply to the agreement on the expiration of a period of 12 months starting on that commencement.

PART 2 – DISCLOSURE OF PRE-CONTRACTUAL INFORMATION

Disclosure of information before prepaid funeral agreement

6. (1) A person must not, in the course of a funeral business, enter into a prepaid funeral agreement unless he or she first provides to the contributor and the recipient the following information:

- (a) the full details of the funeral business;
- (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 and the costs of each service;
- (f) full details of any goods, service or facility to be supplied in connection with the funeral service and the costs of each of the goods, services and facilities;
- (g) 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;
- (h) 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;

- (i) any terms or conditions applying to the conduct of the funeral or to the provision of other funeral services;
- (j) any fees, brokerage or commission payable to the funeral business or to any other person;
- (k) the amount of any GST or other amount payable by law by virtue of the agreement;
- (l) 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 must not make a prepaid funeral agreement for another person without legal authority to do so.

Penalty: Fine not exceeding 50 penalty units.

PART 3 – AGREEMENTS FOR PREPAID FUNERAL SERVICES

Pre-existing prepaid funeral agreements

7. (1) Where, before the commencement of this section and before the death of the recipient, a person carrying on a funeral business has made a prepaid funeral agreement in the course of that business and funeral services have not been provided to the recipient, that person must, within 12 months after that commencement, pay all money received under that agreement to a funeral trust and provide to the contributor and the recipient the information specified in section 6(1).

(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) The Director may exempt a person from the requirement in subsection (1) and may impose on that person and the custodian of the relevant funeral trust any conditions that the Director thinks fit.

(4) A person carrying on a funeral business and a custodian of a funeral trust must comply with a condition imposed by the Director under this section that is applicable to him or her.

Penalty: Fine not exceeding 50 penalty units.

(5) Any money paid to a person carrying on a funeral business under an agreement referred to in subsection (1) is, subject to this Act, to be held in trust for the contributor and is subject to the *Trustee Act 1898*.

(6) Within 3 months after the commencement of this section, 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 stating full details of all money paid under the agreements, the manner in which that money has been invested and any other information that the Director may require.

Penalty: Fine not exceeding 10 penalty units.

Prepaid funeral agreements

8. (1) A person must not in the course of a funeral business supply or arrange for the supply of any funeral services except in accordance with a prepaid funeral agreement made in accordance with this Part.

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 prescribed by the regulations, 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 the information is set out in an attachment to the agreement, reference is to be made in the agreement to the attachment.

(4) Within 7 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

9. (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 marital 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;
- (f) that a funeral service is not required or has already been provided in respect of the recipient.

(2) A person carrying on a funeral business may, by notice in writing to the contributor and the recipient,

terminate a prepaid funeral agreement on either of the following grounds:

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

Duty to deposit payments into trust account

10. Within 7 days after receiving any money under a prepaid funeral agreement, a person carrying on the funeral business must deposit that money in an approved funeral trust.

Penalty: Fine not exceeding 100 penalty units.

Establishment of funeral trust

11. (1) A person carrying on a funeral business in the course of which prepaid funeral services are intended to be provided must establish a funeral trust for the purposes of this Act.

(2) The name of the funeral trust is to be the name of the business followed by the words “prepaid funeral trust”, or any other name approved by the Director.

(3) 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.

(4) 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.

(5) On the revocation of an approval, the Director must notify the trustee 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

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

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

(3) The responsibilities of a 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) All investments made or held by a funeral trust are to be held in the name of the custodian on behalf of the funeral trust.

(5) A person must not hold an investment of a funeral trust in his or her own name without authority under this Act.

Penalty: Fine not exceeding 10 penalty units.

Register of funeral trusts

13. (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 and of the custodian 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 the custodian or any other 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 is to remove particulars of the funeral trust from the register.

Trust accounts

14. (1) A custodian of a funeral trust must establish a trust account and ensure that all money paid under any prepaid funeral agreement is paid into that account.

Penalty: Fine not exceeding 50 penalty units.

(2) Where a trust account is established under this Act, the name of the trust account is to include the

registered name of the relevant funeral trust and is to be approved by the Director.

Duty of funeral trust to refund payments

15. (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 or recipient 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.

(3) If any payment from a funeral trust is required under subsection (2), a person carrying on the relevant funeral business must immediately notify the custodian of the funeral trust.

Penalty: Fine not exceeding 5 penalty units.

Investments of funeral trust

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

(3) A person who is not a custodian or acting on the authority of a 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

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

- (a) to a person carrying on a funeral business for provision of funeral services under the prepaid funeral agreement following the death of the recipient; or
- (b) to the contributor or recipient on the termination of a prepaid funeral agreement by the person carrying on the relevant funeral business in accordance with this Act; or
- (c) where a transferee carries on business in Tasmania, to the transferee's funeral trust in accordance with this Act or, where the transferee carries on business in a State or a Territory other than Tasmania, to the transferee; or
- (d) for the payment of reasonable expenses incurred by the custodian in the administration of the funeral trust and investments of the funeral trust.

Penalty: Fine not exceeding 100 penalty units.

(2) A trustee of a funeral trust must not make a payment from the funds of the 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 and services provided under the agreement.

(5) Where a payment out of a funeral trust is made following termination of a prepaid funeral agreement by the contributor in accordance with this Act, the payment is to be made to the contributor and is to include –

- (a) the total of any payments made by the contributor; and

- (b) an amount representing a reasonable proportion of the earnings made on investments by the trust, having regard to the time that funds have been deposited in the trust account and the proportion of the total funeral trust represented by the contributor's payments into the trust –

after any proper deduction is made for –

- (c) a reasonable proportion of the costs for the administration of the funeral trust and of investments by the trust, including costs of annual audit, having regard to the time that funds have been held by the trust and the proportion of the total funeral trust represented by the contributor's payments into the trust; and
- (d) any other amount debited and payable to the relevant funeral business in accordance with this Act and the prepaid funeral agreement.

(6) Where a payment is made on termination of a prepaid funeral agreement as a result of the relevant funeral business being unable to provide the funeral services, the custodian must make the payment to the contributor or recipient, and the payment is not to be less than the amount that would have been payable if the contributor had terminated the agreement.

(7) Where a payment is made to a transferee in accordance with this Act, the custodian is to make the payment –

- (a) where the transferee carries on business in Tasmania, to the transferee's funeral trust; or

- (b) where the transferee carries on business in a State or a Territory other than Tasmania, to the transferee.

(8) Any payment to a transferee is to be the same amount as would have been payable if the contributor had terminated the agreement.

Insolvency of funeral business

18. 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 person must transfer all the property and investments of the funeral trust to the contributors or recipients in accordance with this Act.

Penalty: Fine not exceeding 100 penalty units.

Duty to maintain register

19. (1) A custodian of a funeral trust must maintain a register of prepaid funeral agreements which records –

- (a) the name and address of each contributor; and
- (b) the name and address of each recipient; and
- (c) a sequential file number corresponding to each prepaid funeral agreement into which a

person carrying on a funeral business has entered; and

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

(2) A person who is a custodian of a 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) money and other consideration received by the custodian in respect of each recipient; and
- (d) expenses incurred by the custodian in the administration and management of the funeral trust; and
- (e) payments from the funeral trust that are made on account of a recipient or on account of a termination of a prepaid funeral agreement

to a transferee or to a funeral business following provision of funeral services; 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

20. (1) On each fifth anniversary of the establishment of a funeral trust, the custodian must cause the value of the funeral trust to be determined by an approved accountant.

Penalty: Fine not exceeding 50 penalty units.

(2) The accountant must determine the total value of the assets and the liabilities of the funeral trust and provide a report to the custodian accordingly.

Annual returns

21. (1) A person carrying on a funeral business must before 31 August 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 between contributors 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 to the funeral trust; and

- (d) a statement whether a register in respect of the funeral business has been maintained in accordance with section 19.

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

- (a) a statement of the estimated value of the funeral trust or, where a value has been determined in accordance with this Act, the actual value of the funeral trust; 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 19; 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.

Assignment of agreements and funds

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

Death of recipient before completion of payments under agreement

23. (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 provide 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.

Disputes about payment of funds

24. In the event of any dispute arising under a prepaid funeral 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.

Copy of records

26. A person carrying on a funeral business and a custodian must keep copies of –

- (a) all prepaid funeral agreements; and
- (b) all records relating to payments by contributors under the agreements; and
- (c) all records relating to a trust account or investment made by a funeral trust –

for a period of not less than 7 years after the agreement is performed or terminated.

Director may require audit

27. (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.

(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**Liability for offences against Act**

28. (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.

Regulations

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

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

- (a) prescribe particulars of the information required under section 8(2) as to the rights and obligations of a person carrying on a funeral business and a contributor; and

- (b) provide for the obligations of the custodian of a funeral trust to make a payment as required under section 15; and
- (c) 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
- (d) specify the circumstances under which any money invested in a funeral trust is to be applied including, without limitation, on the death of, or on termination by, the contributor or termination by the person carrying on the funeral business; and
- (e) exempt a person carrying on a funeral business from the application of any provision of this Act for a specified period.

Administration of Act

30. 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 and Industrial Relations.

***Consumer Affairs Act 1988* amended**

31. The *Consumer Affairs Act 1988* is amended as follows:

- (a) by inserting in section 3A “, the *Prepaid Funerals Act 2003*” after “Consumer Credit (Tasmania) Code”;
- (b) by inserting in section 16(3) “, the *Prepaid Funerals Act 2003*” after “Consumer Credit (Tasmania) Code”;
- (c) by inserting in section 16(4) “, the *Prepaid Funerals Act 2003*” after “Consumer Credit (Tasmania) Code”.