

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

Cemeteries and Crematoria Amendment Bill 2005

EXPLANATORY STATEMENT

**Circulated by the authority of
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Outline

This is an amending Bill. It amends the *Cemeteries and Crematoria Act 2003* referred to in the Amending Bill as the 'Act'. The Act and the Cemeteries and Crematoria Regulations 2003 provide the legislative basis for the management of public cemeteries and crematoria in the Territory. Independent operators provide these services: the ACT Cemeteries Board for cemeteries, and Norwood Park Pty Ltd for the crematorium. The operators finance these services from income received from selling the rights to burial, interment of ashes and memorials to the general public.

The Act commenced in September 2003. When a person acquires the right of burial or interment of ashes, that right lasts forever, see section 8 of the Act. At present, to cater for this right, each operator of a cemetery or crematorium must open a perpetual care trust (PCT) account at an authorised deposit-taking institution (ADI) eg. a bank. A PCT is established with the aim of ensuring that the trust fund created will accumulate and be of sufficient size to allow the interest earned at maturity to be sufficient to finance maintenance of each cemetery or crematorium in perpetuity after it closes. The PCT percentage is the proportion of income received by an operator for sale of each burial, interment of ashes or memorial that must be regularly invested in the PCT fund every month to cover both future short-term and long-term maintenance costs. The PCT percentages were determined by the Minister based on expert advice.

To provide greater certainty the existing PCT funds will provide enough interest earnings to finance long-term maintenance in perpetuity, this Bill amends the Act to establish a reserve for each PCT fund. This reserve is the proportion of the PCT fund which, when it accumulates, will be of sufficient size to finance long-term maintenance in perpetuity after each cemetery or crematorium closes. Consequently, to give greater flexibility to operators, the remainder of a PCT fund will be made available to fund short-term maintenance costs during the life of a cemetery or crematorium. To allow for the possibility of higher returns on the PCT funds invested, the Bill makes it mandatory that operators relinquish their current role as trustee of each PCT fund, and that the ACT Public Trustee becomes the sole trustee and manager of all PCT funds so that funds may be pooled and flexibly invested in a more diverse portfolio of investments than is possible in a single account with a deposit-taking institution ie. a bank. And to ensure investment in the PCTs is made responsive to changing conditions in the local industry, the Bill makes review of the determined PCT percentages possible at any time, and mandatory at least once every five years.

Therefore, in summary, the Bill amends the Act to provide that:

- a PCT percentage applies to the total amount of money collected for each burial, interment of ashes, and for memorials at a cemetery or crematorium;

- operators must use the ACT Public Trustee as trustee and manager of all PCTs;
- at the time PCT percentages are calculated, the PCT reserve percentages are also calculated;
- operators must ensure that an amount equivalent to the PCT reserve percentage be retained in a PCT fund at the end of each five year (or shorter) planning period, and these PCT reserve percentage deposit amounts must not subsequently be drawn down without approval of the Minister; and
- the PCT percentages and the PCT reserve percentages for each cemetery or crematorium must be reviewed at least every five years, and be re-determined by the Minister, if necessary.

Revenue/Cost implications

This Bill has no revenue or cost implications to government for the day-to-day operation of cemeteries or crematoria. However, commissioning a suitably qualified consultant to review the PCT percentages and recommend re-determination, if necessary, is an expected administrative cost to government which will recur at least once every five years.

Clause Notes

Clauses 1 and 2 are formal requirements. They deal with the short title of the Bill, and the commencement provisions.

Clause 3 explains that this Bill amends the *Cemeteries and Crematoria Act 2003*.

Clause 4 provides that the term ‘trust’ will replace ‘funds’ in subsection 6(2)(5) of the Act. This amendment corrects an error in expression discovered in the existing Act.

Clause 5 provides that when a person is given the right of burial or interment of ashes, that right lasts forever. This amendment simply replaces the existing provision in the Act with new words having the same meaning. It was necessary because a new definition of the term *burial place* has been drafted, see clause 9 below.

Clause 6 amends the Act to insert a new Division 2.2: ‘PCTs and reserves’ replacing the old Division 2.2.

Division 2.2. PCTs and reserves

The following sections (9 to 16B) comprise the new Division 2.2 replacing the old Division 2.2 in the Act. Several subsections in the sections following in Division 2.2 are identical with those in the old Act. Their purpose is simply described and the equivalent sections in the old Act are indicated.

Section 9. Establishment of PCTs

New section 9 provides for the establishment of PCTs (PCTs), their purpose, nature, and the role of the public trustee. The significant amendments to this section are:

- (1) providing that PCTs are established for both short-term and long-term maintenance, see new subsection 9(3); and

(2) providing for the public trustee to become the sole trustee of all PCTs, see new subsection 9(5).

Subsection 9(1) provides that new section 9 applies each cemetery or crematorium in the ACT (excluding private burial grounds). No change, same as for section 9(1) in the old Act.

Subsection 9(2) provides for a PCT to be established for each cemetery and crematorium. No change, same as for section 9(2) in the old Act.

New subsection 9(3) provides that (a) a PCT is to provide for both short and long-term maintenance of each cemetery or crematorium, what assets are to be maintained; and (b) for any other purpose approved, in writing, by the Minister. Both ‘short-term’ and ‘long-term’ maintenance is defined in the Dictionary of the Bill, see clauses 10 and 12, below. Assets to be maintained include the grounds of the cemetery and crematorium, monuments, memorials, tombstones, gravestones, tablets, monumental inscriptions, mausoleums, vaults and graves, walls, fences, paths, roads, drains and other works. Funds from a PCT which are for short-term maintenance may be expended during the active life of a cemetery or crematorium, whereas funds for long-term maintenance are only available for expenditure after a cemetery or crematorium closes. This new subsection replaces the old subsection 9(3) in the Act.

Subsection 9(4) provides that an approval under the new subsection 9(3) is a disallowable instrument. A disallowable instrument is presented to the Legislative Assembly, under the Legislation Act, and if it is not disallowed after five sitting days, becomes law. No change, same as for section 9(4) in the old Act.

New subsection 9(5) provides that the public trustee becomes the sole trustee of all PCTs. For the purposes of this Bill, the ACT Public trustee is the public trustee. This amendment allows for the possibility that funds invested in a PCT can be pooled in more diverse, flexible investments earning higher rates of interest than could be earned previously under the old Act where operators were required to be the trustee themselves and open PCT accounts at an approved deposit-taking institution eg. a bank. Operators investing with the ACT Public Trustee will retain the ability to deposit and withdraw funds at short notice. This section replaces subsections 9(5) and 9(6) in the old Act.

Subsection 9(6) provides that a PCT is a public charitable trust and is not for profit. No change, same as for section 9(7) in the old Act.

Subsection 9(7) provides that regulations may be made under this section to declare what kinds of expenditure may, or may not, be regarded as expenditure for maintenance purposes. No change, same as for section 9(8) in the old Act.

Subsection 9(8) provides that any regulation made for the new subsection 9(7) also has effect for the new subsection 9(3). No change, same as for subsection 9(9) in the old Act.

Section 10. Establishment of PCT reserve

New section 10 is an entirely new section providing for the establishment of the PCT reserve (the ‘reserve’), its purposes, disposal of income earned, and accounting. The reserve of a PCT is the proportion to be retained for expenditure on long-term maintenance in perpetuity after a cemetery or crematorium closes.

New subsection 10(1) provides for a PCT reserve (the reserve) to be established for each PCT for a cemetery or crematorium.

New subsection 10(2) provides that reserve forms part of each PCT for a cemetery or crematorium.

New subsection 10(3) provides that the reserve is for long-term maintenance of a cemetery or crematorium. The definition of ‘long-term’ in the Dictionary for the Bill, see clause 10, states that ‘long-term’ means maintenance of a cemetery or crematorium after it closes for new burials or interments of ashes. This section also provides that maintenance means for any of the same purposes that funds in a PCT can be spent, that is, for the purposes defined by new subsection 9(3)(a) and 9(3)(b), see above. Note 1 to this subsection specifies that the reserve cannot be used for any payment unless approved by the Minister, section 16.

New subsection 10(4) provides that any income earned from investments of amounts in the reserve part of a PCT also becomes part of the reserve.

New subsection 10(5) provides that the public trustee must keep the reserve part of a PCT in an account which is identified separately from the rest of the trust.

Section 11. Determination of trust percentages

New section 11 Makes the Minister responsible for the review, notification, and supply of information needed for the determination of the PCT percentages necessary to ensure sufficient funds are held in the PCT including the reserve. Under this section, there are two PCT percentages the Minister must determine: (1) the ‘PCT percentage’, and (2), the ‘PCT reserve percentage’. The ‘PCT percentage’ is the proportion of income received by an operator for sale of each burial, interment of ashes or memorial that must be regularly invested in the PCT fund each month to cover both short-term and long-term maintenance costs. The ‘PCT reserve percentage’ is the proportion of income received by an operator for sale of each burial, interment of ashes or memorial that must be invested in the PCT fund at the end of each planning period. A planning period may be up to five years in duration, see new section 14 below.

New subsection 11(1) provides that the Minister must, for each cemetery or crematorium determine:

- (a) the PCT percentage of each operator’s receipts that is to form part of the PCT of a cemetery or crematorium; and
- (b) the PCT reserve percentage of each operator’s receipts that is to form part of the PCT of a cemetery or crematorium.

New subsection 11(1)(a) is similar to subsection 10(1) in the old Act. Subsection 11(1)(b) is new.

New subsection 11(2) provides that the percentages determined by the Minister in subsection 11(1)(a) and 11(1)(b) must be sufficient so that the cemetery or

crematorium will be adequately maintained in both the short-term and long-term. This section is similar to subsection 10(2) in the old Act.

New subsection 11(3) provides that percentages determined must be notified to the operators and the public trustee. This section similar to subsection 10(3) in the old Act.

New subsection 11(4) provides that percentages determined must be reviewed by the Minister at least once in the planning period. This is a new provision because providing for a statutory planning period is new in this Bill.

New subsection 11(5) provides that the Minister may, by written notice to the operator, request stated information or documents that the Minister needs to either make or review the percentage determinations. This is a new provision, similar to subsection 10(5) in the old Act.

Section 12. Payments into PCT

New section 12 provides that payment of the PCT percentage of the operator's receipts for a cemetery or crematorium by the operator must be made to the public trustee on a monthly basis, and it creates a strict liability offence if an operator of a cemetery or crematorium fails to comply. This section is similar to section 11 in the old Act except that payments by an operator are made directly to the public trustee, and not to an approved deposit-taking institution, as formerly.

New subsections 12(1) and 12(2) provide that section 12 applies to each receipt by received an operator of a cemetery or crematorium, and that the PCT percentage of each receipt by an operator of a cemetery or crematorium forms part of the PCT.

New subsection 12(3) creates an offence if the operator fails to give the PCT percentage of each receipt to the public trustee as soon as possible after the end of each month. The maximum penalty for this offence is 20 penalty units.

New subsection 12(4) provides that the offence for section 12(3) is a strict liability offence, that is, the offender is liable regardless of whether fault can be proved.

Section 13. Planning period

New section 13 provides for the determination, duration and notification of the planning period. This is a new section necessary because the Bill requires the new reserve amount to be deposited in the PCT by the operator at the end of each planning period, see section 14 below, that each planning period will be up to five years in duration, and that the determined percentages (including the new reserve percentages) are required to be reviewed at least once during each planning period. The section provides that the responsible Minister determines, in writing, the planning period for each cemetery or crematorium and must notify the public trustee and each operator.

New subsection 13(1) provides that the Minister must determine, in writing, the planning period for each cemetery or crematorium.

New subsection 13(2) provides that a planning period must be no longer than five years.

New subsection 13(3) provides that the Minister must notify the determined planning period to the operator of each cemetery or crematorium and the public trustee.

Section 14. The PCT reserve

New section 14 provides that an amount equivalent to the PCT reserve percentage must be deposited into the PCT of a cemetery or crematorium at the end of each planning period, and it creates a serious offence if an operator fails to comply. It is these deposited amounts which, when they accumulate, will create sufficient funds in the trust to support maintenance in perpetuity after a cemetery or crematorium closes. Therefore, this section is crucial to achieving the intent of the Bill. This is a new section consequent upon establishment of a PCT reserve to provide for long-term maintenance, see section 10 above.

New subsection 14(1) provides that at the end of a planning period, an amount equivalent to the PCT reserve percentage becomes part of the reserve of the PCT of the cemetery or crematorium.

New subsection 14(2) creates an offence if, at the end of a planning period, an operator fails to take all reasonable steps to ensure that the an amount equivalent to the PCT reserve percentage is in the PCT. The maximum penalty for this serious offence is 50 penalty units, imprisonment for six months, or both.

New subsection 14(3) provides that, for working out of the amount of the reserve equal to the PCT reserve percentage, the percentage to be used is the most recent PCT reserve percentage determined for the cemetery or crematorium. This provision ensures that the percentage used for calculating the equivalent reserve amount will be up-to-date.

Section 15. Protection of PCT

New subsection 15 provides for the protection of PCT funds from being spent by an operator for any purpose other than a purpose for which the PCT was established (ie for maintenance, see section 9 above), including payment of the operator's debts, or to satisfy a judgement against the operator. The section creates an offence if an operator misuses the PCT funds. In these respects, this section is similar to section 13 in the old Act. In addition, to make it clear compliance with this section is the operator's responsibility, there is no obligation on the public trustee to ensure amounts in the PCT are applied for a particular purpose.

New subsection 15(1) creates an offence if the operator of a cemetery or crematorium fails to apply an amount in a PCT for purposes other than those for which the trust was established. Maximum penalty for this offence is 50 penalty units.

New subsection 15(2) provides that an amount forming part of a PCT is not (a) available for payment of debts of an operator of a cemetery or crematorium, or (b), liable to be attached or taken in execution to satisfy a judgement against an operator of a cemetery or crematorium.

New subsection 15(3) provides that, notwithstanding subsection 15(2) above, if expenditure is incurred by an operator for a purpose for which the trust is established, an operator would be (a) liable to payment of debts for this purpose, or (b), such an amount could be attached or used to satisfy a judgement against the operator.

New subsection 15(4) provides that the public trustee is not obligated to ensure amounts in the PCT are used for a particular purpose. This provision emphasises that it is the operators who are obliged to ensure funds in a PCT are used for the trust's purposes, not the public trustee.

Section 16. Protection of PCT Reserve

New section 16 provides that an amount forming part of the reserve of a PCT cannot be used for any payment without the approval of the Minister.

This section provides a safeguard to ensure the PCT reserve is used only for the purposes it was created, that is, for the maintenance of cemeteries and crematoria in perpetuity after they close for new burials and interments.

Section 16A. Accounts and records for PCTs

New section 16A provides for the keeping of accounts and records by the operator for operator receipts, for amounts paid to and withdrawn from the public trustee of the PCT, including amounts paid to the reserve of the trust, and for the purposes for which amounts are applied. Operator receipts are defined in the Dictionary of the Bill as being equivalent to the amounts received by operators for a burial, interment of ashes or memorial (including, for example, purchase of a burial place, or any service relating to burials, interments or memorials). It is these amounts to which the determined PCT percentages and the PCT reserve percentages are applied for the purposes of calculating the equivalent amounts, respectively, which must be invested by the operators in the PCT fund at (1) the end of each month, see section 12, or (b) at the end of each planning period, see section 14, above. This revised definition in the Bill gives effect to the policy intention that the determined PCT percentages should apply to the total amount of money received for burials, interments of ashes and memorials at a cemetery or crematorium. Accounts and records must be kept in a suitable way for auditing purposes for seven years, and in accordance with any prescribed regulations. This new section is equivalent to section 15 in the old Act.

New subsection 16A(1) creates an offence if the operator of a cemetery or crematorium does not keep accounts and records that show (a), operator receipts, and (b), amounts paid to the public trustee for the PCT, and (c), amounts withdrawn from the PCT (including the reserve of the PCT), and the purposes for which these amounts are applied. The maximum penalty for this offence is 20 penalty units.

New subsection 16A(2) creates an offence if the operator of a cemetery or crematorium does not keep the records and accounts of the PCT (a) at the operator's principal place of business in the ACT, or at another place with the written approval the Minister, and (b), in a way that they can be conveniently and properly audited, and (c) for at least seven years, and (d), in accordance with any requirement prescribed by regulation. The maximum penalty for this offence is 20 penalty units.

New subsection 16A(3) provides that an offence against subsection 16A(2) is a strict liability offence, that is, the offender is liable regardless of whether fault can be proved.

16B. Audit

New section 16B provides for the timely auditing of accounts of a PCT within the meaning of the Corporations Act, and for the reporting of audited accounts to the chief executive. Full responsibility for correct auditing rests with the operators. Failure to comply is a strict liability offence. This new section is equivalent to section 16 in the old Act.

New subsection 16B(1) creates an offence if the operator of a cemetery or crematorium fails to have the accounts and records of the PCT (and the reserve) audited by a person who is a registered company auditor under the Corporations Act at the end of each financial year. The maximum penalty for this offence is 50 penalty units.

New subsection 16B(2) creates an offence if the operator does not give the auditor's report and audited accounts to the chief executive as soon as is practicable after the end of the financial year to which the report relates. The maximum penalty for this offence is 20 penalty units.

New subsection 16B(3) provides that an offence against section 16B(2) is a strict liability offence, that is, the offender is liable regardless of whether fault can be proved.

Clause 7 is a tidying-up provision which amends the Act to insert a new section 52.

Section 52. Continuation of perpetual care trust

New section 52 Is a tidying-up provision that ensures a perpetual care fund making up a PCT established under section 9 before the commencement of this section, continues under this Act; and this new section 52 expires immediately after it commences.

The following clauses amend the Dictionary of the Bill in line with the amendments.

Clause 8 amends the Act to insert a new term: 'public trustee' to the list in Note 2 of the Dictionary. Note 2 lists terms for which dictionary definitions are given in part one of the Legislation Act.

Clause 9 amends the Act to insert a new definition of *burial place* in the Dictionary. This new definition aligns more closely with wording of section 8(1) in the old Act.

Clause 10 amends the Act to insert new definitions for *long-term* and *operator receipt* in the Dictionary.

Clause 11 amends the Act to omit the definition for *perpetual care fund* from the Dictionary.

Clause 12 amends the Act to insert new definitions for *PCT percentage* (see new subsection 11(1)(a)), *PCT reserve percentage* (see new subsection 11(1)(b)), *planning period*, *reserve* (see new subsection 10(1)), and *short-term* in the Dictionary.