

# Fair Trading (Pre-paid Funerals Code of Practice) Regulations 2018

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Consultation Draft

## **Fair Trading (Pre-paid Funerals Code of Practice) Regulations 2018**

Made by the Governor in Executive Council.

### **1. Citation**

These regulations are the *Fair Trading (Pre-paid Funerals Code of Practice) Regulations 2018*.

### **2. Commencement**

These regulations come into operation as follows —

- (a) regulations 1 and 2 — on the day on which these regulations are published in the *Gazette*;
- (b) the rest of the regulations — on the day that is 6 months after that day.

### **3. Code of practice prescribed**

The code of practice set out in Schedule 1 and entitled the *Pre-Paid Funerals Code of Practice 2018* is prescribed under section 45 of the Act as a code of practice that applies in relation to the supply of goods or services under a pre-paid funeral contract as defined in the code and how amounts received under those contracts are invested.

### **4. Expiry**

These regulations expire at the end of the day that is 3 years after the day Schedule 1 comes into operation under regulation 2(b).

## Schedule 1 — *Pre-paid Funerals Code of Practice 2018*

[r. 3]

### Division 1 — Preliminary

#### 1. Application of code

This code applies to pre-paid funeral contracts entered into on or after the day this code comes into operation.

#### 2. Terms used

In this code —

***cemetery manager*** means a person who has the care, control and management of a cemetery under the *Cemeteries Act 1986*;

***client*** means a person who enters into a pre-paid funeral contract with a funeral organiser;

***cooling-off period***, in relation to a pre-paid funeral contract, means the period —

- (a) starting when the client signed the contract; and
- (b) ending on the day that is 30 days after the day client is given a signed copy of the contract;

***financial product*** has the meaning given in the *Corporations Act 2001* (Commonwealth) section 763A;

***funeral broker*** means a person who arranges for a funeral to be carried out by a funeral director;

***funeral director*** means a person who provides funeral services;

***funeral investment*** means a financial product in which the proceeds are paid out —

- (a) when the investment manager receives written notice from the funeral organiser that the funeral arranged for the recipient under the pre-paid funeral contract has been carried out in accordance with the contract; or
- (b) when the pre-paid funeral contract is terminated;

***funeral organiser*** means a funeral broker or funeral director;

***funeral services*** means goods and services that are provided in connection with providing a funeral and include —

- (a) organising death and funeral notices; and
- (b) providing a coffin, casket, urn or other container to be used for the recipient's remains; and
- (c) providing flowers; and
- (d) providing or erecting a memorial; and
- (e) providing a hearse and vehicles to be used for mourners; and
- (f) granting a right of burial; and
- (g) carrying out a service for the funeral; and
- (h) carrying out an interment or a cremation;

**investment manager** means a person who may act as an investment manager under clause 14;

**memorial** includes —

- (a) a headstone; and
- (b) a memorial plaque; and
- (c) a tombstone; and
- (d) an inscription; and
- (e) a monument; and
- (f) a memorial seat; and
- (g) a landscaping feature; and
- (h) another fixture or thing commemorating a grave or the placement of ashes;

**pre-paid funeral contract** —

- (a) means a contract between a client and a funeral organiser entered into during the life of a recipient under which —
  - (i) the client agrees to make a prepayment; and
  - (ii) the funeral organiser agrees to arrange or provide funeral services for the recipient;

but

- (b) does not include a contract to carry out funeral services between a person and a cemetery manager;

**prepayment** means an amount paid to the funeral organiser under a pre-paid funeral contract before the death of the recipient;

*recipient*, in relation to a pre-paid funeral contract, means the person to whom the funeral services provided under the contract relate;

*statement of variation* means a statement of variation that complies with clause 10(4);

*variable pre-paid funeral contract* means a pre-paid funeral contract in which the details of the funeral services to be provided under the contract are subject to change under the contract from time to time unilaterally by the funeral organiser who entered into the contract.

### **Division 2 — Requirements for pre-paid funeral contracts**

#### **3. Formation of pre-paid funeral contracts**

- (1) A funeral organiser must ensure that a pre-paid funeral contract —
- (a) is made in writing in a print size of not less than 12 points; and
  - (b) is signed by the funeral organiser and by the client; and
  - (c) is dated with the date when each party signed the contract; and
  - (d) sets out whether the pre-paid funeral contract is a fixed pre-paid funeral contract or a variable pre-paid funeral contract; and
  - (e) if the pre-paid funeral contract is a variable pre-paid funeral contract —
    - (i) sets out which terms in the contract are variable; and
    - (ii) sets out when and how those terms are variable; and
    - (iii) requires a statement of variation must be given under clause 10 when a term is varied.
- (2) In subclause (1)(d) —  
*fixed pre-paid funeral contract* means a pre-paid funeral contract in which the details of the funeral services are fixed in the contract and are not subject to unilateral change by the funeral organiser.
- (3) If the recipient in relation to a pre-paid funeral contract is not the client in relation to the contract, the funeral organiser must not enter into the contract unless the funeral organiser has taken reasonable steps to be satisfied that the recipient —

- (a) agrees to the client entering into the contract; or
- (b) lacks the capacity —
  - (i) to enter into the contract; or
  - (ii) to agree to the client entering into the contract.

**4. Pre-paid funeral contract to identify particular persons**

A funeral organiser must not enter into a pre-paid funeral contract unless the contract sets out —

- (a) the name, business address and telephone number of the funeral organiser; and
- (b) if a pre-paid funeral contract entered into by a funeral broker requires that a funeral director who is to carry out the funeral services be selected — the name, business address and telephone number of the funeral director; and
- (c) the name and residential address of the client; and
- (d) if the client is not the recipient — the name and residential address of the recipient; and
- (e) the name, address and, if available, telephone number of at least 2 persons who the funeral organiser is to contact on the death of the recipient; and
- (f) the name, business address and telephone number of the investment manager to whom payments are to be made under the contract as referred to in clause 7.

**5. Pre-paid funeral contracts to include particular details about the funeral services to be provided**

- (1) A funeral organiser must not enter into a pre-paid funeral contract unless the contract sets out the following for the funeral services to be provided on the death of the recipient —
  - (a) the name and address of the place at which the funeral is to be held;
  - (b) details about the following matters —
    - (i) death and funeral notices;
    - (ii) a memorial that is to be provided or erected;
    - (iii) floral arrangements;

- (iv) the hearse to be used;
    - (v) vehicles to be used for mourners;
    - (vi) the service for the funeral, including who is to conduct the service;
  - (c) the details of any other service connected to the funeral;
  - (d) the way the recipient's remains are to be disposed of;
  - (e) the type and style of coffin, casket, urn or other container to be used and the materials of which it is made and details of any linings, fittings and mountings;
  - (f) if the recipient's remains are to be interred — the name and address of the cemetery at which the remains are to be interred;
  - (g) if there is an interment right in force for the benefit of the recipient —
    - (i) the name of the holder of the interment right; and
    - (ii) the name of the cemetery manager who granted the interment right; and
    - (iii) the period over which the interment right is granted; and
    - (iv) the nature and location of the interment site;
  - (h) if there is a separate contract (a **memorial contract**) for a memorial for the recipient —
    - (i) the parties to the memorial contract; and
    - (ii) a description of the memorial to be provided under the memorial contract; and
    - (iii) state whether the costs of the memorial have been, or are to be, fully paid.
- (2) A funeral broker must not enter into a pre-paid funeral contract requiring that a client select a funeral director to carry out the funeral services unless the contract —
- (a) sets out how, if the funeral director selected is not able to carry out the funeral, another funeral director is to be selected to carry out the funeral services; and
  - (b) includes the following note in not less than 14 point bold type —



**NOTE — SELECTING A FUNERAL DIRECTOR**

**When you enter into this contract you will be required to select a funeral director to carry out the funeral services. However, the funeral director you selected is not guaranteed.**

**If the funeral director you selected does not carry out the funeral services, an alternate funeral director will be selected in accordance with the contract.**

**6. Pre-paid funeral contracts to set out particular financial details**

- (1) A funeral organiser must not enter into a pre-paid funeral contract unless the contract —
- (a) sets out —
    - (i) the total cost of the funeral services to be arranged under the contract; and
    - (ii) a list of documents that are to be prepared in relation to the funeral (including a document that is to be given to the Registrar under the *Births, Deaths and Marriages Registration Act 1998* section 42), the cost or likely cost of those documents and whether the costs are likely to change; and
    - (iii) how much and when the cost of transporting the recipient's remains are to be paid under the contract;and
  - (b) states whether the following are to be provided under the contract and whether the cost given under paragraph (a)(i) includes or excludes costs or fees for the following —
    - (i) interment or cremation;
    - (ii) acquiring a necessary right of burial;
    - (iii) a memorial;and
  - (c) if an amount is to be retained by the funeral organiser for expenses incurred before the recipient's death including, for example, an amount relating to the issue of an interment right — states the amount; and

- (d) sets out fees or charges (including an administration or cancellation fee) to be, or that may be, charged by the funeral organiser who entered into the contract.
- (2) A funeral organiser must not enter into a pre-paid funeral contract unless the contract provides for what happens in relation to payments made or to be made under the contract if —
- (a) the funeral organiser ceases to carry on business before the contract is performed, including if the funeral organiser becomes, according to the *Interpretation Act 1984* section 13D, a bankrupt or a person whose affairs are under insolvency laws; and
  - (b) the funeral organiser is unable to perform the contract for any reason; and
  - (c) the payments required to be made under the contract are not made in full and on time; and
  - (d) the recipient moves to a location where the funeral services may no longer be provided including, for example, moving outside of the State; and
  - (e) the client ends the contract other than under a right in the contract; and
  - (f) the recipient dies before a payment required under the contract is made.

**7. Pre-paid funeral contracts to require payments and notices to be given to investment managers**

- (1) A funeral organiser must not enter into a pre-paid funeral contract unless the contract provides that the funeral organiser must —
- (a) pay, within the time stated in subclause (2), a prepayment the funeral organiser receives under the contract to —
    - (i) for each prepayment in relation to a contract with a cemetery manager to carry out funeral services — the cemetery manager; or
    - (ii) for another prepayment — an investment manager;and
  - (b) give the person to whom a prepayment was paid under paragraph (a) a written notice that —
    - (i) identifies the contract to which the prepayment relates; and
    - (ii) names the client; and
    - (iii) if the client is not the recipient — names the recipient; and
    - (iv) sets out the terms of the contract required to be included under clause 6.
- (2) The prepayment must be paid —
- (a) for a prepayment received by the funeral organiser during the cooling-off period — between the end of the cooling-off period and 7 days after the end of the cooling-off period; or
  - (b) for another prepayment — within 7 days after receiving the prepayment.
- (3) Each time a funeral organiser receives a prepayment under the contract, the funeral organiser must comply with subclause (1) in relation to the prepayment.
- (4) A funeral organiser must not enter into a pre-paid funeral contract unless the contract provides that the funeral organiser must give the investment manager a written notice stating that the obligations under the contract have been carried out.

**8. Right to terminate during cooling-off period**

- (1) A funeral organiser must not enter into a pre-paid funeral contract unless the contract includes the following —
- (a) a term that the client may end the contract during the cooling-off period by giving written notice to the funeral organiser;
  - (b) a term that the funeral organiser must make full repayment of any amount the client has paid under the contract within 7 days of the contract ending in the cooling-off period;
  - (c) a term that the client is not liable in any way for ending the contract within the cooling-off period;
  - (d) the following note in not less than 14 point bold type —

**NOTE — COOLING-OFF PERIOD**

**When you enter into this contract you will receive a signed copy of the contract. You have the right to end the contract by giving written notice to the person with whom you entered into this contract within the period starting when you signed the contract and ending on the day that is 30 days after the day you received that copy. If you exercise this right you are entitled to the full repayment of any amount that you have paid under the contract.**

**You should consider the taxation and social security implications of ending the contract.**

- (2) If a client ends a pre-paid funeral contract during the cooling off period by giving written notice to the funeral organiser, the funeral organiser must —
- (a) make full repayment of any amount the client has paid under the contract within 7 days of the contract ending; and
  - (b) not hold the client liable in any way for ending the contract within the cooling-off period.

**9. Right to amount held under pre-paid funeral contract if contract dependent on membership of entity**

- (1) This clause applies if a pre-paid funeral contract is conditional on the client becoming or remaining a member of a company, association or body of persons (an *entity*), whether incorporated or unincorporated.

- (2) A funeral organiser must not enter into the pre-paid funeral contract unless the contract provides a right for the client to receive the greater of the following amounts if the contract ends because the client is not or no longer eligible for membership of the entity —
- (a) a refund of the prepayments paid by the client before the contract is terminated;
  - (b) the amount held in a funeral investment by the investment manager in the client's name in relation to the contract when the contract is terminated.

**10. Right to terminate variable pre-paid funeral contracts after material variation to contract**

- (1) In this clause —
- material variation**, to a variable pre-paid funeral contract, means a variation to the contract that —
- (a) is financially or otherwise detrimental to the client; or
  - (b) is a significant change to the details of the funeral services or financial details included in the contract;
- minor variation**, to a variable pre-paid funeral contract, means a variation to the contract other than a material variation to the contract.
- (2) A funeral organiser must not enter into a variable pre-paid funeral contract unless the contract provides that —
- (a) before the contract is varied, the funeral organiser who entered into the contract must give the client a statement of variation; and
  - (b) the contract is not varied until 30 days after the client receives a statement of variation.
- (3) A funeral organiser must also not enter into a variable pre-paid funeral contract unless the contract provides that if a variation of the contract is a material variation, the client has —
- (a) a right to end the contract within 30 days after receiving a statement of variation; and
  - (b) if the client decides to end the contract because of the material variation — that the client has a right to receive the greater of the following amounts when the contract ends —

- (i) a refund of the prepayments paid by the client before the contract is terminated;
  - (ii) the amount held in a funeral investment by the investment manager in the client's name in relation to the contract when the contract is terminated.
- (4) The statement of variation must be in writing and specify —
  - (a) the nature of the variation; and
  - (b) whether the variation is a material variation or minor variation; and
  - (c) if the variation is a material variation —
    - (i) that the contract is not varied until 30 days after receiving a statement of variation about the variation; and
    - (ii) that the client has 30 days after receiving the statement of variation to end the contract;and
- (d) if the client decides to end the contract — the client has a right to receive the greater of the following amounts when the contract ends —
  - (i) a refund of the prepayments paid by the client before the contract is terminated;
  - (ii) the amount held in a funeral investment by the investment manager in the client's name in relation to the contract when the contract is terminated.

**11. Other termination rights**

- (1) A funeral organiser must not enter into a pre-paid funeral contract that provides a right to end the contract (in addition to the right to end the contract during the cooling-off period) unless the contract sets out —
  - (a) who may exercise the right; and
  - (b) the way the person may exercise the right; and
  - (c) the financial arrangements that will apply if the right is exercised, including any period of notice required to withdraw amounts paid to an investment manager.

- (2) A funeral organiser must not enter into a pre-paid funeral contract that provides a right to end the contract unless the contract sets out the following note in not less than 14 point bold type in the part of the contract dealing with termination rights —

**NOTE — FOR THE INFORMATION OF THE PARTY ENDING THE CONTRACT**

**You should consider the taxation and social security implications of ending the contract.**

**12. Giving signed pre-paid funeral contracts to particular persons**

The funeral organiser must give a copy of the signed pre-paid funeral contract to the following persons as soon as is reasonably practicable after the client and funeral organiser have signed the contract —

- (a) the client;
- (b) if the client is not the recipient — the recipient;
- (c) the persons stated in the contract under clause 4(e) and (f).

**13. Funeral organisers to keep register of pre-paid funeral contracts**

A funeral organiser must keep a register of pre-paid funeral contracts that records the following for each contract that the funeral organiser enters into —

- (a) the details that must be set out in the contract under clause 4;
- (b) the amount of each prepayment;
- (c) when each prepayment is to be made;
- (d) when the funeral organiser is to give each prepayment to an investment manager;
- (e) an amount that is to be set out in the contract under clause 6(1)(c).

**Division 3 — Investment managers**

**14. Persons who may act as investment managers under the code**

A person must not act as an investment manager under this code unless the person is —

- (a) a company registered under the *Life Insurance Act 1995* (Commonwealth) section 21; or

- (b) a friendly society as defined in the *Life Insurance Act 1995* (Commonwealth) section 16C; or
- (c) a licensed trustee company as defined in the *Corporations Act 2001* (Commonwealth) section 601RAA; or
- (d) the Public Trustee as defined in the *Public Trustee Act 1941* section 2.

**15. Investing amounts paid to an investment manager**

An investment manager must, within 28 days of receiving an amount (a **contract amount**) from a funeral organiser under a pre-paid funeral contract —

- (a) invest the contract amount received in a funeral investment designated in the client's name for the contract; and
- (b) give the client and the funeral organiser a written notice stating —
  - (i) the funeral organiser's name; and
  - (ii) the client's name; and
  - (iii) if the client is not the recipient — the recipient's name; and
  - (iv) the investment manager's name; and
  - (v) the contract amount received by the investment manager from the funeral organiser; and
  - (vi) if an amount is paid from the contract amount to the investment manager or another person for expenses or a commission — the amount paid and the reason it was paid; and
  - (vii) the amount that was invested from the contract amount; and
  - (viii) the particulars of the funeral investment in which the contract amount was paid into.

Clerk of the Executive Council.