

280 Maitland Road, Mayfield NSW 2304  
PO Box 883, Newcastle NSW 2300  
Telephone (02) 4967 2333 Fax (02) 4945 3680

18 October 2019

Manager  
Financial Services Reform Taskforce  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By Email: [FuneralExpenseReforms@treasury.gov.au](mailto:FuneralExpenseReforms@treasury.gov.au)

Dear Sir or Madam

**Re: Removal of the Exemption for Funeral Expenses Policies Exposure Draft**

**Australian Funeral Fund Management Pty Ltd ("AFFM")** has managed **Pre-Paid Funeral Plan** investments in NSW since 2003. Under the Funeral Funds Act 1979 (NSW), the company is registered by NSW Fair Trading as a trustee of trust funds under pre-paid funeral contracts. The Funeral Funds Act 1979 (NSW) prohibits any company or person who is not registered under the Act from holding funds under pre-paid funeral contracts, and includes regulatory reporting and requirements on AFFM as a registered trustee.

AFFM welcomes many of the key findings from the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the "Report")* including those directly related to **Funeral Insurance** (which are referred to in the Report and the Exposure Draft Explanatory Materials as "**Funeral Expenses Policies**"). We agree that such policies carry significant financial risks and have negative impacts on many consumers.

AFFM is concerned however, with the proposals as presented in the *Removal of the Exemption for Funeral Expenses Policies Exposure Draft (the "Exposure Draft")* in that they appear to encompass **Pre-Paid Funeral Plans** together with **Funeral Insurance** products. We note that these are distinctly different products and they should not be grouped together for regulatory purposes.

**Pre-Paid Funeral Plans**

**Pre-Paid Funeral Plans** are a contractual arrangement between a person or client directly with a funeral director. This arrangement is an agreement requiring the funeral director to perform the funeral services requested by the client (as detailed in the contract) at an undetermined date in the future (i.e. at the time of death) with no additional costs being payable by the client's estate at the time of the funeral for those goods and services provided as detailed in the contract.

Whilst the contractual arrangement is directly between the client and the funeral director, various state legislation (including Funeral Funds Act 1979 (NSW)) dictate the requirements for **Pre-Paid Funeral Plans**, including the investment of pre-paid funds into an approved scheme. This ensures that the funds are preserved, through lodgement with a registered trustee, until the contracted services have been performed

(i.e. the funeral service). It is only when the contracted funeral is performed that the funds are released by the trustee to the funeral director.

It is important to note, however, that the funeral director is contractually obliged to provide the contracted services regardless of the investment balance then held by the registered trustee. Historical evidence shows that in most cases, fund returns do not keep up with the funeral directors and disbursement or third-party expenses that the funeral director is responsible to provide under the contractual arrangement. Despite this, the client still receives the goods and services they have previously paid for and the funeral director must bear the burden of any loss (being the difference between the commercial rate of the contracted funeral and the investment balance with the registered trustee).

### **Contrast to Funeral Insurance (Funeral Expenses Policies)**

The features of **Funeral Insurance** (Funeral Expenses Policies), identified by Commissioner Haynes as causing significant harm to vulnerable consumers, were:

- (a) The actual funeral costs incurred for a policyholder may be less than the nominated limit under the person's policy; and
- (b) The amount a policyholder pays in premiums over the life of a policy may be more than the amount that may be payable as a benefit (being actual funeral costs) under the person's policy.

Neither of these features are present in a **Pre-Paid Funeral Plan**, because:

- (a) The person pre-arranges their funeral and pays the current price for the funeral;
- (b) The payment is then lodged with a registered trustee, to hold and invest until the funeral is performed;
- (c) The amount of the investment balance at the time of the person's death is paid to the funeral director, in exchange for provision of the contracted funeral; and
- (d) Accordingly, there is no risk of the person's estate being burdened with additional expenses, nor is there any ongoing obligation to make further payments for the rest of the person's life (which could lead to overpayment).

Whilst there doesn't appear to be any direct reference to **Pre-Paid Funeral Plan** products in the Report's Interim or Final Reports, **Funeral Insurance** products are mentioned, and it is quite clear the intent of the proposed legislative changes is to encompass **Funeral Insurance** products within ASIC's regulatory framework. Several negative statements and observations contained within the reports, such as, "...the statistic gathered by the Australian Securities and Investments Commission ("ASIC") as at 30 June 2014 suggest that funeral insurance policies sold directly to consumers are of little value..."<sup>1</sup> and "...many funeral insurance products carry 'the potential for consumers to pay more in premiums over the life of the policy than they will receive as a benefit when they die'..."<sup>2</sup> reinforce this intent.

Unlike **Funeral Insurance** products, **Pre-Paid Funeral Plans** are not offered directly by the fund manager to the public and are instead a contractual agreement directly between the client and the funeral director for the supply of a funeral service. The Australian Taxation Office (the "ATO") forms the view that the funeral

---

<sup>1</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry *Final Report*, vol 1, p285; see also *Interim Report*, vol 1, p263.

<sup>2</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry *Final Report*, vol 1, p286; see also *Interim Report*, vol 1, p263 and ASIC, Report 454, 29 October 2015, p20 [47].

director has achieved an income from “pre-selling” these services and as such, the funeral director is liable for Goods and Services Tax (“GST”) on these services at the point the pre-paid contract is entered into – not at the later date when the funeral is supplied.

### **Operation of Pre-Paid Funeral Plans**

There are multiple **Pre-Paid Funeral Plan** trustees Australia wide and whilst a few funds are operated by Friendly Societies, several are not (including AFFM). Despite this, these funds must still adhere to the relevant legislative requirements within their respective states (for example, in NSW, it is the *Funeral Funds Act 1979*).

It is important to note that, as a registered trustee under the Funeral Funds Act 1979 (NSW), AFFM has regulatory and reporting requirements. This includes a requirement to lodge with Department of Fair Trading:

1. Annual returns;
2. Annual audited financial statements; and
3. An actuarial report every 3 years.

There is a clear regulatory regime governing the operation of AFFM as a registered trustee of **Pre-Paid Funeral Plan** funds in NSW.

### **Submissions and Amendments Sought**

As *Pre-Paid Funeral Plans* do not fall within either category of the two types of *Funeral Insurance* products referred to in the Report, defined as *Funeral Life Policies* and *Funeral Expense Policies*<sup>3</sup>, it is apparent the intent of the Exposure Draft’s proposed legislative changes is not to impact *Pre-Paid Funeral Plans* with additional regulatory burdens.

This view is reinforced by the Exposure Draft’s direct exclusion of *Pre-Paid Funeral Plans* operated by friendly societies as they are not impacted through definition of **friendly society funeral product** in **subregulation 7.6.01(7)** of the **Corporations Regulation 2001**.

In its current form, the Bill would result in:

- (a) Friendly Societies operating **Pre-Paid Funeral Plans** not being required to obtain an AFSL, or otherwise being required to comply with the obligations in the Act;
- (b) Otherwise, AFFM, and all other registered trustees of **Pre-Paid Funeral Plans** (who are not Friendly Societies) being required to obtain an AFSL, and otherwise comply with the obligations in the Act;
- (c) Funeral directors who are offering **Pre-Paid Funeral Plans** of Friendly Societies to be exempted from having their own AFSL (or being an authorised representative of an AFSL), through the proposed insertion of **subregulation 7.6.01(1)(ta)** into the **Corporations Regulations 2001**; and
- (d) Otherwise, funeral directors who are offering **Pre-Paid Funeral Plans** of AFFM and all other registered trustees (other than Friendly Societies) to have their own AFSL, or be an authorised

---

<sup>3</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry *Final Report*, vol 1, p285; see also *Interim Report*, vol 1, p262-263.

representative of an AFSL, due to the exemption in proposed **subregulation 7.6.01(1)(ta)** only extending to **Pre-Paid Funeral Plans** through Friendly Societies.

**We submit:**

1. The contractual arrangement between the client and the funeral director is the same, irrespective of whether the manager of the funds paid under the pre-paid funeral contract is a Friendly Society or registered trustee (regulated under State legislation).
2. There is no difference in the operation of **Pre-Paid Funeral Plans** operated by Friendly Societies and registered trustees (regulated under State legislation).
3. There is no basis upon which **Pre-Paid Funeral Plans** through registered trustees (such as AFFM) should be treated differently than those through Friendly Societies.
4. Given the nature of the product and the objective of the Report, **all** **Pre-Paid Funeral Plans** should be included in the exemptions - not just those operated by Friendly Societies.

In the circumstances, AFFM seeks the following amendments:

1. Further definitions be inserted in **Subregulation 1.0.02(1)** as follows:

**trustee funeral product:** *see subregulation 7.6.01(7)*

**pre-paid funeral contract** *means an agreement between a person and a funeral services entity, whose purpose is or includes the payment of money (in a lump sum or by instalments) or the giving of other valuable consideration for the supply of a funeral service, with or without the supply of goods connected with that service, being an agreement made before the death of the person who is to be supplied with that service.*

2. **Paragraph 7.06.01(1)(ta)** be amended to provide as follows (such amendment being underlined):

*(ta) a financial service provided by a person in the following circumstances:*

- (i) The financial service is providing financial product advice in relation to a friendly society funeral product or a trustee funeral product, or dealing in a friendly society funeral product or a trustee funeral product;*
- (ii) The person is a funeral services entity, or an employee, director or other officer of a funeral services entity; and*
- (iii) The financial service is provided in the funeral service entity's ordinary course of business as a funeral services entity.*

3. A further definition be inserted in **Subregulation 7.6.01(7)** as follows:

**trustee funeral product** *means a financial product that is an account (however described):*

- (a) Provided by a body that is a registered or authorised or approved trustee of funds paid pursuant to a pre-paid funeral contract; and*
- (b) The sole purpose of which is to provide money pursuant to a pre-paid funeral contract.*

Thank you for considering our submission on this important proposed legislation.

Yours faithfully

A handwritten signature in purple ink, appearing to read 'Ross Mason', with a stylized, cursive script.

**Ross Mason**  
**Director**  
**Australian Funeral Fund Management**