

14. THE BIGHT CEMETERY, WINGHAM – UPDATE 5

Report Author Paul De Szell - Director Liveable Communities

Date of Meeting 30 June 2021

Authorising Director Paul De Szell - Director Liveable Communities

SUMMARY OF REPORT

This report provides both Council and the community with an update on the actions undertaken at The Bight Cemetery, Wingham.

SUMMARY OF RECOMMENDATION

1. That Council note the information provided in this report.
2. That Council staff correspond with and update all registered parties / affected families in relation to enacting the steps outlined in the table of actions within The Bight Cemetery Restoration Action Plan.

FINANCIAL/RESOURCE IMPLICATIONS

Council's insurers have advised that all rectification works at The Bight Cemetery will be covered under Council's Insurance Policy.

Council will however be required to pay the excess on the policy which is \$12,500. The cost of the excess is proposed to be funded out of revoted unspent funds in the Cemetery operations budget which have been transferred to an internal reserve.

LEGAL IMPLICATIONS

Council is currently seeking legal advice in relation to several matters of interpretation of the Cemeteries and Crematoria Act 2013.

BACKGROUND

Council at its meeting of 11 September 2019 considered an initial update report in relation to the actions that have occurred and are proposed to occur at The Bight Cemetery, Wingham.

At this meeting Council resolved:

1. *That the information provided in this report be noted; and*
2. *That Council endorse the actions identified in Annexure A to this report.*

The actions identified in Annexure A to the report that were presented to Council on 11 September 2019 were in a tabular form which was updated with additional columns to highlight:

- a) at what stage the action will be undertaken; and
- b) the status of the action.

This was presented to Council on 27 November 2019.

This table is contained in Attachment B in the above-mentioned report.

Also presented to Council at its meeting of 27 November 2019 was a Draft 'Restoration Action Plan for The Bight Cemetery', Wingham which was agreed to as a stage two action.

At this meeting Council resolved:

1. *That the information provided in this report be noted.*
2. *That Council liaise with "The Blight of the Bight", community group, National Trust, Heritage Advisor and affected families prior to the formal adoption of the Draft "The Bight Cemetery Restoration Action Plan".*
3. *That information provided by Council in response to GIPA Application 20/20 be provided to Councillors via email by the next Council Meeting.*
4. *Council liaises with the families over the appointment of the stonemasons*

At the Council meeting of 25 March 2020 a report on point two of the above resolution was presented.

This report discussed the feedback received on the draft 'The Bight Cemetery Restoration Action Plan' from Council's Heritage Advisor, Cemeteries and Crematoria NSW, Blight of the Bight community group, National Trust and family members.

At this meeting Council resolved:

1. *Council note the information provided in this report.*
2. *Council engage an independent professionally qualified heritage consultant to prepare a Conservation Management Plan for The Bight Cemetery in accordance with the NSW Heritage Office guidelines and the National Trust Guidelines for Cemetery Conservation.*
3. *Information from the Conservation Management Plan for The Bight Cemetery (once adopted by Council) be used to update the Draft 'The Bight Cemetery Restoration Action Plan'.*
4. *The Draft 'The Bight Cemetery Restoration Action Plan' be updated as recommended in the body of this report.*
5. *Further to consultation with Council's Heritage officer and Heritage Reference group, a further report be provided to Council that includes a finalised Restoration Action Plan for The Bight Cemetery so that it can be adopted and works can proceed.*
6. *As a parallel process, Council undertake the assessment of all impacted headstones as a separate task.*
7. *Council split the repair and restoration into 2 sections (headstones less than 50 years and headstones more than 50 years old).*
8. *Council discuss assessments with families.*
9. *Council proceed with work for headstones less than 50 years old (in parallel with the development of the Conservation Management Plan) if deemed appropriate by Council's Heritage Officer.*

At the Council meeting of 16 December 2020 both Council and the community were provided with an update on the feedback provided in relation to the draft Conservation Management Plan and the revised Restoration Action Plan for The Bight Cemetery, Wingham.

At this meeting Council resolved that:

1. *Council note the information provided in this report.*
2. *Council adopt draft 'The Bight Cemetery Conservation Management Plan' subject to the changes outlined in this report.*
3. *Council adopt the updated 'The Bight Cemetery Restoration Action Plan'.*
4. *That Council acknowledge an error in the original report pertaining to the date in which the Heritage Reference Group received the information in relation to the draft CMP and The Bight Cemetery Restoration Action Plan.*
5. *That a letter be sent to families and contacts to update them.*

DISCUSSION

Since December 2020 Council staff, have, continued to refine and correct the adopted Conservation Management Plan and we are currently working on correcting errors that have been identified by the community and the Blight of the Bight group, specifically in relation to Appendix B.

It is expected that all of these issues / errors will be dealt with by the time that Council considers this report on 30 June 2021.

In this regard, it is important to confirm the ongoing desire of Council staff to move forward and commence restoration of the monuments and memorials which were laid over in July 2019.

The public link below provides an outline of what occurred in July 2019 and the actions that have been taken since, including the development of the Action Plan for Restoration and the Conservation Management Plan:

<https://www.midcoast.nsw.gov.au/Part-of-your-every-day/Council-Projects/The-Bight-Cemetery-Wingham-repair-program>

Since the adoption of the Action Plan and Conservation Management Plan, staff have also been working through the advice provided by Cemeteries and Crematoria NSW (CCNSW) (see Annexure A) that was submitted in relation to the draft Conversation Management Plan and Action Plan for restoration.

In particular, the last paragraph of the attachment to this letter which states:

"2. "14. That there be wider promotion and longer notification periods be used because many families are outside the area..." :

Council should note that families saying they represent the families of the deceased interment right holder or those interred may not necessarily have the legal right to provide consent to works on monumentation on a grave. As noted above where a holder is deceased, the cemetery operator can transfer the interment right to the beneficiaries of the holder's estate or their successors, with appropriate supporting documentation. That new holder can then give

permission concerning any works to memorialisation of a grave. A cemetery operator cannot override that right. Beneficiaries of an estate may not necessarily be family members or those contacting Council. In addition succession for those who pass away intestate is determined in accordance with intestacy rules set out in the Succession Act 2006”.

The relevant legislation in relation to this paragraph lies within Subdivision 2 of the Cemeteries and Crematoria Act 2013 which is provided below.

“Subdivision 2 Interment rights generally

46 Nature of interment right

- (1) A cemetery operator must:
- (a) permit the interment of the remains of the person to whom it relates at the site in a cemetery identified in, or in accordance with, the interment right, and
 - (b) permit the interment in accordance with the cultural or religious practice applicable to the part of the cemetery in which the interment site is located at the time the interment right is granted, and
 - (c) permit a memorial to the deceased person to be erected at the site with the approval of the cemetery operator, and
 - (d) leave the remains undisturbed in perpetuity (or, in the case of a renewable interment right, until such time as the remains may be disturbed or removed in accordance with this Act) unless disturbance or removal at an earlier time is requested or authorised by the holder of the interment right, and
 - (e) leave any memorial to the deceased person lawfully erected at that site, with the permission of the cemetery operator, undisturbed (provided the interment right remains in force and the memorial is kept in good repair) until such time as the memorial may be disturbed in accordance with this Act unless disturbance at an earlier time is requested or authorised by the holder of the interment right.
- (2) A cemetery operator must comply with the requirements of subsection (1) (d) and (e).
Maximum civil penalty: \$27,500.
- (3) Subject to the regulations, a cemetery operator must ensure that any remains of a person that are disturbed or removed are dealt with in accordance with any cultural or religious practices applicable to the remains.

47 Types of interment right

The cemetery operator may grant an interment right entitling the person or persons to whom it is granted the exclusive right of interment in a specified interment site:

- (a) in perpetuity (a **perpetual interment right**), or
- (b) for the period an interment right granted under section 54 remains in force (a **renewable interment right**).

48 Duration of interment right

An interment right remains in force:

- (a) if it is a perpetual interment right—in perpetuity, and
- (b) if it is a renewable interment right—until the end of the period commencing on the day on which the interment right is granted and ending on the day the interment right expires under section 54 (the **statutory renewal period**).

49 Interment rights may be bequeathed

- (1) *The holder of an interment right may (subject to section 51) bequeath the right as if it were the holder's personal estate.*
- (2) *A person to whom an interment right devolves as a result of a bequest does not become the holder of the right until the cemetery operator's register is amended to indicate that fact.*
- (3) *On application made by a person to whom an interment right has devolved as a result of a bequest, the cemetery operator must amend the cemetery operator's register so as to indicate that the person has become the holder of the interment right.*
- (4) *An application under this section must be in the form prescribed by the regulations or approved by the Cemeteries Agency and accompanied by the appropriate fee.*
- (5) *The executor or administrator (within the meaning of the [Probate and Administration Act 1898](#)) of the estate of the holder of an interment right who has bequeathed the interment right must give the relevant cemetery operator written notice of the death of the holder within the period prescribed by the regulations after the executor or administrator becomes aware of the death.*

50 Rules of intestacy to apply to interment rights not bequeathed

- (1) *If the holder of an interment right dies and has not bequeathed the interment right, the interment right is to be dealt with as if it were personal property forming part of the estate of an intestate.*
- (2) *A person to whom an interment right devolves as a result of intestacy does not become the holder of the interment right until the relevant cemetery operator's register is amended to indicate that fact.*
- (3) *On application made by a person to whom an interment right has devolved as a result of intestacy, the cemetery operator must amend the relevant cemetery operator's register so as to indicate that the person has become the holder of the interment right.*
- (4) *An application under this section must be in the form prescribed by the regulations or approved by the Cemeteries Agency and accompanied by the appropriate fee.*

51 Interment right to pass to surviving joint holder

On the death of a joint holder of an interment right, the remaining joint holder is, or joint holders are, entitled to the interment right.

52 Revocation of perpetual interment rights

- (1) *A cemetery operator may revoke a perpetual interment right that the cemetery operator, or any previous cemetery operator for the cemetery concerned, has granted if the right conferred by the perpetual interment right is not exercised within 50 years after it is granted.*
- (2) *Before revoking a perpetual interment right under this section, the cemetery operator must cause notice of its intention to do so to be sent, by registered post, to the person (if any) shown in the relevant cemetery operator's register as the holder of the perpetual interment right.*

- (3) *If no response to the notice under subsection (2) is received within 28 days after the date on which it is sent, the cemetery operator is to cause a further notice of the intention to be sent, by registered post, to each person shown in the relevant cemetery operator's register as a secondary contact with respect to the holder.*
- (4) *If no response to the notice under subsection (2) or (3) is received within 28 days after the date on which it is sent, a second notice of the cemetery operator's intention is to be given by means of an advertisement, identifying the interment site and the name of the holder:*
- (a) *displayed in a prominent position at the crematorium, cemetery or portion of a cemetery concerned, and*
 - (b) *published in the Gazette and in:*
 - (i) *a newspaper circulating throughout the State, or*
 - (ii) *a manner approved in writing by the Minister having regard to the object of bringing notices of that kind to the attention of the holders of the relevant interment rights or (where holders have died) any persons entitled to the relevant interment rights as the result of bequests or intestacy or as surviving joint holders.*
- (5) *If no response to the second notice is received within 6 months after the date on which it is advertised, final notice of the cemetery operator's intention is to be sent, by registered post, to the person (if any) shown in the register as the holder of the perpetual interment right allowing the holder 28 days from the date of the final notice within which to enter into negotiations of the kind referred to in subsection (7).*
- (6) *If the cemetery operator has insufficient information to properly address the notice referred to in subsection (2) or (5), the operator is not required to send that notice but may in that case begin the notification process by means of the notice referred to in subsection (4) and may take any other notification action the operator considers appropriate.*
- (7) *At any time before the expiry of the period for responding to the final notice referred to in subsection (5) (or, in the circumstances referred to in subsection (6), within 28 days after the last date on which an advertisement referred to in subsection (4) (b) is published) the holder of the perpetual interment right concerned may enter into negotiations with the cemetery operator for:*
- (a) *the sale of the perpetual interment right, or*
 - (b) *the retention of the perpetual interment right.*
- (8) *Any notice required to be displayed or published under this section may relate to more than one interment site.*

53 Compensation

- (1) *If a cemetery operator revokes the perpetual interment right for an interment site the former holder of that interment right is entitled to one or other of the following at the election of the cemetery operator (but no other compensation or entitlement with respect to the revocation):*
- (a) *to be granted a perpetual interment right for an alternative interment site in the same cemetery (and, if available, in the same general location) as the original interment site,*
 - (b) *to be paid by the cemetery operator, by way of compensation, an amount equal to half of the fee payable (as provided by the cemetery operator's current scale of fees) for the granting of a perpetual interment right for an alternative interment*

site in the same cemetery (and, if available, in the same general location) as the original interment site.

- (2) *If there is no alternative interment site available, or if there is no applicable scale of fees, the amount of compensation referred to in subsection (1) (b) is to be half of the fee payable for the granting of an interment right under the most recent applicable scale of fees, varied in proportion to any variation in the Consumer Price Index (All Groups Index) for Sydney that has occurred between the date on which that scale was established and the date of revocation of the interment right.*
- (3) *A cemetery operator must ensure that any report on its accounts contains an estimate of its contingent liability with respect to any interment rights it has revoked.*
- (4) *(Repealed)*
- (5) *Despite section 58 (Transfer of interment right to a person other than cemetery operator), if the former holder of the revoked interment right is granted an interment right for an alternative interment site, that interment right may not be transferred by the former holder within 5 years after the date on which it was granted.*
- (6) *An application for an entitlement under this section:*
 - (a) *must be in the form approved by the Cemeteries Agency, and*
 - (b) *must be accompanied by the appropriate fee, and*
 - (c) *must be lodged with the cemetery operator within 6 years after the date on which the relevant interment right was revoked.*

Note—Pursuant to section 107 (8) the fee referred to in paragraph (b) if set by a Crown cemetery operator is subject to variation or disallowance by the Cemeteries Agency.

- (7) *A former holder of a revoked interment right may apply to the Cemeteries Agency for a review of any election of the cemetery operator under this section.*
- (8) *The Cemeteries Agency's decision on such a review:*
 - (a) *is final, and*
 - (b) *is taken to be the decision of the cemetery operator, and*
 - (c) *is to be given effect to accordingly.*
- (9) *In this section, **former holder** of a revoked interment right means the person who held that right immediately before it was revoked”.*

In order to begin to address the issue we have developed four new forms based on CCNSW templates to facilitate the transfer of interment rights. Links to these forms are provided below:

[Application for copy of entry in cemetery operator's register](https://au.openforms.com/Form/b1e4baa6-109a-4053-998e-6fa75fbbdf2e)

<https://au.openforms.com/Form/b1e4baa6-109a-4053-998e-6fa75fbbdf2e>

[Transfer of an interment right \(by holder\)](https://au.openforms.com/Form/40d5de8d-d2b2-4ce6-83b3-86a15e6827b7)

<https://au.openforms.com/Form/40d5de8d-d2b2-4ce6-83b3-86a15e6827b7>

[Transfer of an interment right as a bequest](https://au.openforms.com/Form/1592e5be-b53c-4127-aff7-67cccd7c5271)

<https://au.openforms.com/Form/1592e5be-b53c-4127-aff7-67cccd7c5271>

[Transfer of an interment right as a result of intestacy](https://au.openforms.com/Form/c2268631-5dcf-4e54-9d83-a8289d945dbf)

<https://au.openforms.com/Form/c2268631-5dcf-4e54-9d83-a8289d945dbf>

It is fair to say that the advice provided by CCNSW has created some confusion as to the process moving forward and we have sought legal advice to assist us in defining this process for both Council and the affected families. To date no advice has been formally received.

In this regard, it is important to note that neither MidCoast Council, nor any its previous constituent councils have ever received a request to transfer an interment right under either section 49 or 50 of the Act after a deceased person has been interred at a cemetery.

We have also sought advice in relation to a number of other questions raised by the community since the adoption of the *draft 'The Bight Cemetery Conservation Management Plan'* and *'Restoration Action Plan for The Bight Cemetery, Wingham'*.

In relation to direct contact with our community, below is a list of the formal correspondence to the registered parties / families regarding The Bight Cemetery that has been sent over the last 18 months. It should be noted that a number of other individual responses to correspondence have also been provided.

7 January 2020	Email – Bight Cemetery Restoration Action Plan requesting feedback on draft plan
2 April 2020	Email – Bight Cemetery Restoration Action Plan – copy of report & minutes from Council meeting 25 March 2020
10 August 2020	Email – Bight Cemetery Restoration Action Plan – update on progress undertaken
15 October 2020	Email – Bight Cemetery Conservation Management Plan – feedback sought
26 October 2020	Email - Bight Cemetery Conservation Management Plan – feedback sought reminder
16 November 2020	Email - Bight Cemetery Conservation Management Plan – feedback sought reminder
23 December 2020	Email – Bight Cemetery Restoration Program – what happens next
24 February 2021	Email – Bight Cemetery Restoration Program - update

It is intended to correspond with and update the registered parties / families following the receipt of legal advice.

RECOMMENDATION

1. That Council note the information provided in this report.
2. That Council staff correspond with and update all registered parties / affected families in relation to enacting the steps outlined in the table of actions within The Bight Cemetery Restoration Action Plan.

ANNEXURE

A: Correspondence from Cemeteries and Crematoria (CCNSW)



OUT20/14660

27 November 2020

The General Manager
MidCoast Council
PO Box 482
TAREE NSW 2430

council@midcoast.nsw.gov.au

Dear Mr Panuccio

The Bight Cemetery Conservation Management Plan

Thank you for your email of 15 October 2020 regarding The Bight Cemetery Conservation Management Plan.

Cemeteries & Crematoria NSW (CCNSW) is the part of the NSW Government that regulates cemetery and crematorium operators and provides information on burial and cremation options to the public. Its objectives include ensuring that everyone in NSW has the right to a dignified burial or cremation, that is respectful of religious and cultural beliefs.

CCNSW also has a role in addressing and resolving complaints concerning cemeteries and crematoria, including Crown land, local government, private, church and community operated cemeteries and crematoria.

In commenting on the management plan, I would like to refer to CCNSW's previous letter to you of 5 February 2020 (our reference OUT20/1264) concerning The Bight Cemetery, along with our previous correspondence with Mr Paul De Szell of Mid Coast Council, concerning numerous complaints received by CCNSW in relation to Council's actions in laying down grave monuments within The Bight Cemetery. CCNSW has previously outlined our expectations, as regulator, in addressing the concerns raised.

CCNSW will continue monitoring Council's progress in responding to this matter. We appreciate Council has accepted that Council staff did incorrectly laid down a number of headstones at The Bight Cemetery, Wingham and that, following concerns from the community all work in relation to the laying down of headstones at The Bight and other cemeteries was indefinitely suspended.

CCNSW notes Council's public exhibition of The Bight Cemetery Conservation Management Plan and updated version of The Bight Cemetery Restoration Action Plan are currently on public exhibition. Our comments on these documents are attached for your reference.

These comments do not constitute legal advice but represent CCNSW's understanding of the law. Council is recommended to obtain its own legal advice.

Finally, CCNSW requests that Council continue to keep CCNSW informed of progress to resolve this matter, and that you confirm with us once all of the rectification works have been completed on the affected headstones.

Locked Bag 5022, Parramatta NSW 2124
Tel: 02 9842 8473 ABN: 20 770 707 468
www.dpie.nsw.gov.au/ccsw

If you have any queries please contact Martin Sewell, Operations Manager at CCNSW, by phone 9842 8470 or email martin.sewell@cemeteries.nsw.gov.au.

Yours sincerely

A handwritten signature in black ink that reads "Jennifer Hickey". The signature is written in a cursive, flowing style.

Jennifer Hickey
Chief Executive Officer
Cemeteries & Crematoria NSW

Attachment 1 – CCNSW comments on The Bight Cemetery Conservation Management Plan

1. **Section 3.2 “State Legislation” on page 9 is missing reference to the *Cemeteries and Crematoria Act 2013* and the *Crown Lands Management Act 2013*.**

The *Cemeteries and Crematoria Act 2013* regulates the interment sector, including cemetery operators such as Mid Coast Council, and interment rights

Under Section 46(1)(e) of the *Cemeteries and Crematoria Act 2013* a cemetery operator must leave any memorial to the deceased person lawfully erected at that site, with the permission of the cemetery operator, undisturbed (providing the interment right remains in force and the memorial is kept in good repair) until such time as the memorial may be disturbed in accordance with the Act unless disturbance at an earlier time is requested or authorised by the holder of the interment right.

The *Crown Lands Management Act 2016* provides for the regulation and management of Crown land in NSW. The Bight Cemetery is on Crown land (State Government land). Council (MCC) has responsibility for the cemetery under s.48 *Local Government Act 1993*. Management of the cemetery must be consistent with the requirements of the *Crown Lands Management Act 2016*.

2. **Section 7.5 “Owner’s Requirements” on page 95 incorrectly refers to The Bight Cemetery as being located on MCC owned land.**

The cemetery is on Crown land (State Government land). MCCC has responsibility for the cemetery under s.48 *Local Government Act 1993*. It should be noted that MCC has not been appointed Crown Land Manager of the land under the *Crown Lands Management Act 2016*. However, Council is the Crown Cemetery Operator of the land under the *Cemeteries and Crematoria Act 2013*.

3. **Section 8.4 “Conservation and Maintenance” on page 99 also needs to note that as stated above under Section 46(1)(e) of the *Cemeteries and Crematoria Act 2013* a cemetery operator must leave any memorial to the deceased person lawfully erected at that site, with the permission of the cemetery operator, undisturbed (providing the interment right remains in force and the memorial is kept in good repair) until such time as the memorial may be disturbed in accordance with the Act unless disturbance at an earlier time is requested or authorised by the holder of the interment right.**

Where a holder is deceased, the cemetery operator can transfer the interment right to the beneficiaries of the holder’s estate or their successors, with appropriate supporting documentation. That new holder can then give permission concerning any works to memorialisation of a grave. A cemetery operator cannot override that right.

If Council was not able to identify beneficiaries of the holder’s estate or successors, CCNSW would expect, consistent with Part 4 of the *Cemeteries and Crematoria Act 2013*, that Council be able to demonstrate they have made reasonable efforts to identify who the beneficiaries of the late interment right holder’s estate are (if any) or their successors, and / or whether any possible other living successors to the holder agrees with proposed monument works at a grave, pending the transfer of the interment right to a new living holder,

This section should also note operators have a responsibility to ensure that monuments are designed and installed to meet appropriate standards and policies—most notably AS 4204:2019 *Headstones and cemetery monuments* and AS 4425:1996 *Above ground burial structures*.

CCNSW comments on The Bight Cemetery Restoration Action Plan:

1. **“7. The Monuments Risk Assessment and Management Program remain suspended..” on page 7:**

As previously requested in correspondence with Council concerning complaints about the laying down of monuments in The Bight Cemetery, CCNSW expects Council to refer to CCNSW any relevant cemeteries policies, processes and procedures prepared in response, for endorsement by CCNSW prior to adoption and implementation by Council

2. **“14. That there be wider promotion and longer notification periods be used because many families are outside the area...” :**

Council should note that families saying they represent the families of the deceased interment right holder or those interred may not necessarily have the legal right to provide consent to works on monumentation on a grave. As noted above where a holder is deceased, the cemetery operator can transfer the interment right to the beneficiaries of the holder's estate or their successors, with appropriate supporting documentation. That new holder can then give permission concerning any works to memorialisation of a grave. A cemetery operator cannot override that right. Beneficiaries of an estate may not necessarily be family members or those contacting Council. In addition succession for those who pass away intestate is determined in accordance with intestacy rules set out in the *Succession Act 2006*.