

## **DIRECTOR LIVEABLE COMMUNITIES**

### **2. THE BIGHT CEMETERY, WINGHAM – UPDATE 6**

**Report Author** Paul De Szell - Director Liveable Communities

**File No. / ECM Index**

**Date of Meeting** 25 August 2021

**Authorising Director** Paul De Szell - Director Liveable Communities

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#### **SUMMARY OF REPORT**

This report provides both Council and the community with an update on the most recent actions undertaken in relation to The Bight Cemetery, Wingham and seeks Council's adoption of a revised and updated 'The Bight Cemetery Restoration Action Plan'.

#### **SUMMARY OF RECOMMENDATION**

1. That Council note the information provided in this report.
2. That Council adopt the revised and updated 'The Bight Cemetery Restoration Action Plan' provided in Attachment A.
3. That all registered parties / affected families be informed of the adoption of a revised and updated 'The Bight Cemetery Restoration Action Plan'.
4. That the process outlined in the revised and updated 'The Bight Cemetery Restoration Action Plan' be commenced without any further delay.

#### **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 has sought legal advice (externally) in relation to several matters of interpretation of the Cemeteries and Crematoria Act 2013 and Council's Special Counsel has liaised directly with staff from Cemeteries and Crematoria NSW to assist in this interpretation.

#### **ATTACHMENT**

A: The Bight Cemetery Restoration Action Plan

Attachment A has been circulated electronically to the Councillors and Senior Staff, however this Attachment is publicly available on Council's website.

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## 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.*

More recently, on 30 June 2021 both Council and the community were provided with a further update, which indicated that staff had continued to refine and correct the adopted Conservation Management Plan and confirmed the ongoing desire of staff to move forward and commence the restoration of the monuments and memorials which were laid over in July 2019.

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

In particular, the last paragraph of the attachment to the advice received from CCNSW (Annexure A) states:

*“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”.*

At this meeting Council resolved:

1. *That Council apologises for the delay in carrying out restoration works at The Bight Cemetery.*
2. *That Council liaise with Cemeteries & Crematoria NSW in relation to The Bight Cemetery Restoration Action Plan.*
3. *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.*
4. *That Council continue to update the conservation management plan (CMP) as necessary as more information comes to light, noting that the CMP is a document that can be edited and updated when needed.*
5. *That Council notes the report.*
6. *That an updated report come back to Council no later than August 2021.*

## **DISCUSSION**

Council staff considered the comments of CCNSW (see Annexure A) and concluded that the issues raised had ramifications, more broadly, for the processes currently adopted to achieve restoration of the 68 affected headstones.

In response, Council sought external legal advice in relation to several matters of interpretation of the Cemeteries and Crematoria Act 2013 and Special Counsel engaged by Council liaised directly with staff from Cemeteries and Crematoria NSW to assist in this interpretation. The purpose of this advice was to assist in legally defining the correct process for both Council and the affected families to follow under the provisions of the Cemeteries and Crematoria Act 2013.

This advice has culminated in the drafting of a revised and updated ‘The Bight Cemetery Restoration Action Plan’ (see Attachment A), which now sets out the correct legal process to achieve restoration of the 68 affected headstones.

Following the completion of this work, a revised and updated ‘The Bight Cemetery Restoration Action Plan’ was forwarded to Cemeteries and Crematoria NSW with a letter which is provided in Annexure B.

In response, Cemeteries and Crematoria NSW have indicated that:

*“the process which Council has proposed is consistent with the spirit of the legislation and the provisions of the Act .....CCNSW does not have any further suggested amendments or specific comments to make on the updated plan and thanks the Council for their co-operation in resolving this matter”.*

In addition to these comments Cemeteries and Crematoria NSW have also requested that:

*“Council provide CCNSW with quarterly progress reports on the action taken to resolve this matter until all of the rectification works have been completed on the affected headstones. The first progress report, due by end October, should specify the time frames on the Action Plan, including an estimation of when all works will be completed”.*

A complete copy of the response provided by Cemeteries and Crematoria NSW is provided in Annexure C.

Council staff have worked closely with both Special Counsel and Cemeteries and Crematoria NSW to revise and update ‘The Bight Cemetery Restoration Action Plan’. Once adopted this will enable a process to begin to achieve restoration of the 68 affected headstones.

### **Community Consultation**

While the community has been consulted at several points during the initial preparation and then revision of ‘The Bight Cemetery Restoration Action Plan’, they have not been consulted in the preparation of the attached revised and updated ‘plan.

This is because the purpose of the revision and updating has been to define the statutory process that is required to be followed under the Cemeteries and Crematoria Act 2013.

On this basis only Cemeteries and Crematoria NSW, the statutory authority in relation to all Cemeteries and Crematoria in NSW, has been consulted.

Both the community and all registered parties / affected families will be informed if the Council resolves to adopt the revised and updated ‘The Bight Cemetery Restoration Action Plan’.

### **RECOMMENDATION**

1. That Council note the information provided in this report.
  2. That Council adopt the revised and updated ‘The Bight Cemetery Restoration Action Plan’ provided in Attachment A.
  3. That all registered parties / affected families be informed of the adoption of a revised and updated ‘The Bight Cemetery Restoration Action Plan’.
  4. That the process outlined in the revised and updated ‘The Bight Cemetery Restoration Action Plan’ be commenced without any further delay.
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## ANNEXURES

A: Letter from Cemeteries & Crematoria NSW dated 27 November 2020



OUT20/14660

27 November 2020

The General Manager  
MidCoast Council  
PO Box 482  
TAREE NSW 2430

[council@midcoast.nsw.gov.au](mailto: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.

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Tel: 02 9842 8473 ABN: 20 770 707 468  
[www.dpie.nsw.gov.au/ccnsw](http://www.dpie.nsw.gov.au/ccnsw)

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](mailto:martin.sewell@cemeteries.nsw.gov.au).

Yours sincerely



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*.

B: Council letter to Cemeteries & Crematoria NSW dated 19 July 2021



2 Biripi Way | PO Box 482  
Taree NSW 2430

19 July 2021

Jennifer Hickey  
Chief Executive Officer  
Cemeteries & Crematoria NSW  
Department of Planning, Industry & Environment

Your ref: OUT20/14660

Attention: Martin Sewell (Operations Manager) – Only by email

Dear Officers

### **The Bight Cemetery – Update on Conservation Management Plan and Action Plan**

Thank you for your letter dated 27 November 2020.

In response to submissions received from the public exhibition of the Bight Cemetery Conservation Management Plan (CMP), including the valuable response from CCNSW, the CMP has been updated and all errors identified thus far have been corrected to the best of Council's knowledge.

As previously communicated to CCNSW, following the incorrect laying down of headstones by Council staff at the Bight Cemetery, the Council held a public meeting and met with interested community representatives. The desired outcomes expressed by the community, and the Council's actions to deliver on them, were endorsed by Council and subsequently documented in the Bight Cemetery Restoration Action Plan (the Action Plan), which was adopted on 16 December 2020.

Council officers have also considered the comments of CCNSW and concluded that the issues raised also have ramifications, more broadly, for the Council's processes to achieve restoration of the 68 affected headstones.

In particular, Council notes the following response from CCNSW:

*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.*

In order to guide a practical response to the issues raised, Council officers have prepared an amended Action Plan. A copy of the amended Action Plan (dated July 2021) with marked-up

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tracked-changes showing the amendments from the adopted version (enclosed). It is intended that the amended Action Plan be put before the Council's elected body, with a recommendation for adoption, as soon as possible.

The Council in particular draws your attention to Part 6 of the Action Plan, to which the following additional Action Item has been added:

Action	Details
Seek to determine the legal Interment Right Holder/s for each of the headstones requiring restoration.	<p>Council will:</p> <ol style="list-style-type: none"> <li>1. Investigate its records;</li> <li>2. Carry out broad public notification for a 28-day period, inviting applications under the <i>Cemeteries and Crematoria Act 2013</i> to:               <ol style="list-style-type: none"> <li>(a) record an interment right devolving to another person (s49 or s50);</li> <li>(b) transfer an interment right to another person or to the Council as cemetery operator (s58 or s59);</li> <li>(c) request a determination as to whether a person/s is the holder of an interment right (s61);</li> </ol> </li> <li>3. Assess and determine any applications received in accordance with the <i>Cemeteries and Crematoria Act 2013</i> and amend the interment right holder in Council's cemetery register accordingly if necessary.</li> </ol> <p>Further information in relation to this Action is set out in Annexure B.</p>

The Council's preliminary review of its records reveals that the Council's "old cemetery register" only contains records from 1968 onwards, when the Council's predecessor commenced management of the cemetery.

Of the 68 affected headstones, only 25 relate to an interment after 1968. That is, in respect of more than half of the memorials, the Council does not hold any records as to the original interment right holder. In such circumstances, it cannot be assumed that the person interred was the interment right holder.

With this in mind, to address the very likely circumstances that a holder of an interment right cannot be conclusively determined, the Council proposes the following course of action (see Annexure B):

Circumstances	Process
If no applications are received or if the determination of any applications results in there being no registered holder in respect of an interment right relevant to a headstone proposed for repair.	<p>The Council will consult with registered interested family members in relation to the proposed restoration works.</p> <p>Whether to proceed with a particular scope of works for a headstone will be decided on a case-by-case basis, taking into account any submissions received.</p>

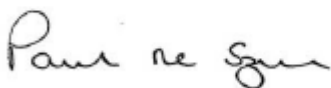
If there is no registered holder and no registered family members.	The Council will proceed with a particular scope of works in accordance with the principles in this Action Plan and the Conservation Management Plan.
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Several other associated amendments have been made to guide the communications by Council with both family members who have registered their contact details and the lawful interment right holder.

I wish to notify CCNSW of this intended course of action (as documented in the revised Action Plan) and provide CCNSW with an opportunity for comment. I would be grateful if CCNSW could review the enclosed amended Action Plan and advise if it has any objection to the processes, actions and outcomes proposed therein.

Should you wish to discuss, please contact me on (02) 7955 7410 or by email [paul.deszell@midcoast.nsw.gov.au](mailto:paul.deszell@midcoast.nsw.gov.au)

Yours sincerely



Paul De Szell  
Director Liveable Communities



C: Letter from Cemeteries & Crematoria NSW dated 13 August 2021



OUT21/10336

13 August 2021

The General Manager  
MidCoast Council  
PO Box 482  
TAREE NSW 2430

[council@midcoast.nsw.gov.au](mailto:council@midcoast.nsw.gov.au)

Attention Paul De Szell

Dear Mr Panuccio

**The Bight Cemetery Restoration Action Plan**

Thank you for Council's email of 19 July 2021 regarding the updated The Bight Cemetery Restoration Action Plan.

After reviewing the updated plan, Cemeteries & Crematoria NSW (CCNSW) considers the process which Council has proposed is consistent with the spirit of the legislation and the provisions of the Act. These comments do not constitute legal advice but represent CCNSW's understanding of the law. Council is recommended to obtain its own legal advice.

CCNSW acknowledges that you will be undertaking a public information program to identify interment rights holders and urges you to undertake that process as soon as possible.

CCNSW also requests that Council provide CCNSW with quarterly progress reports on the action taken to resolve this matter until all of the rectification works have been completed on the affected headstones. The first progress report, due by end October, should specify the time frames on the Action Plan, including an estimation of when all works will be completed.

CCNSW does not have any further suggested amendments or specific comments to make on the updated plan and thanks the Council for their co-operation in resolving this matter.

If you have any queries please contact Martin Sewell, Operations Manager at CCNSW, phone 9842 8470 or email [martin.sewell@cemeteries.nsw.gov.au](mailto:martin.sewell@cemeteries.nsw.gov.au).

Yours sincerely

A handwritten signature in black ink that reads 'Jennifer Hickey'.

Jennifer Hickey  
Chief Executive Officer  
Cemeteries & Crematoria NSW

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