

2.3 Commercial Activities on Cemetery Land

2.301 Since 2000, we have received two complaints about commercial activities being carried on at cemeteries in competition with those of private sector monumental masons.

2.302 The first complaint alleged that the trustees of a cemetery were:

- selling memorial headstones to the public from the cemetery office; and
- wholesaling imported pre-made memorial units.

2.303 The second complaint involved the sale of memorial plaques to the public from the office of another cemetery that was under the control of a local authority.

2.304 The complaints raised a question about whether such activities:

- were consistent with the Burial and Cremation Act 1964 (the Act); and
- involved unfair competition with private sector monumental masons.

2.305 The claim that the trustees were competing unfairly with the private sector was based on the grounds that cemetery trustees:

- do not pay tax on the profits from retail memorial sales; and
- receive free audit services from the Audit Office.⁴

2.306 As the auditor of public cemeteries under the Act, we decided to inquire into the complaints.

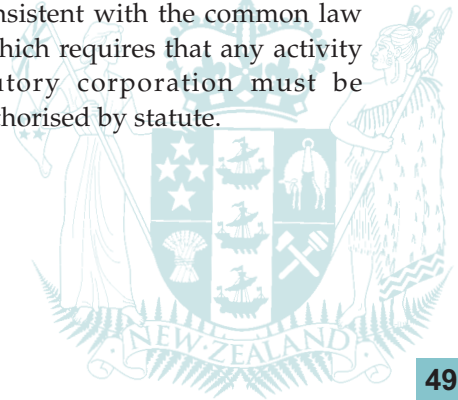
⁴ Up until 1 July 2001, section 29(3) of the Act prevented fees being charged for the audit of any cemetery. On 1 July 2001, the Public Audit Act 2001 repealed that provision, enabling the Audit Office to charge cemetery trustees for audit services. However, as the majority of cemeteries are small with very little revenue and few transactions, the Audit Office has decided to charge only for audits of cemeteries that have revenue in excess of \$50,000 per year.

Unlawful Activity

- 2.307 We concluded that no-one managing a cemetery under the Act has statutory authority to engage in commercial activities in the cemetery. As the activities being carried on were outside the managers' lawful powers and (therefore) unlawful, we told them that they should stop.
- 2.308 We reported our conclusions on both complaints to the Ministry of Health (as administering department of the Act). The Ministry had obtained its own legal opinion that agreed with our conclusion.

Burial and Cremation Act

- 2.309 Managers of cemeteries subject to the Act can exercise functions and powers in respect of the cemetery property to the extent permitted by the Act. Therefore, we reached our conclusion after considering the functions and powers of the managers as set out in the Act.
- 2.310 The Act makes no reference to the use of cemetery land for the supply or sale of headstones or memorial units. Instead:
- Section 9 contains an exhaustive list of the powers that cemetery managers have in relation to tablets (i.e. headstones). These powers relate to the erection, maintenance and removal of tablets in the cemetery itself. They do not extend to the undertaking of tablet sales.
 - Section 21 expressly prohibits the use of the land comprised in a cemetery for any purpose other than the Act authorises. Such a limitation is not unusual for a statutory body, and is consistent with the common law doctrine of *ultra vires* – which requires that any activity undertaken by a statutory corporation must be expressly or impliedly authorised by statute.



2.311 Other sections of the Act that we took into account were:

- Sections 9(a), 16(1)(h), 21(2), 21(4), 21(5), 28(4) and 40(1)(f), which precisely describe the forms of income that managers can receive under the Act – none of which allow the managers to receive income from headstone sales.
- Section 28(2), which provides that managers may spend their funds on “the management and improvement of the cemetery and for the several purposes and objects authorised by this Act”. In our view, the managers did not have the power to spend their funds running a commercial activity.
- Section 28(4), which allows the managers to invest any of their funds “not for the time being required”. In our view, the power to invest applies only to funds which are surplus, and not needed for the performance of the managers’ functions under the Act. We did not consider the power to invest surplus funds enabled the managers to undertake a business activity that was not otherwise authorised by the Act.

Appropriateness of Commercial Activities

2.312 The complaints raised a broader question regarding appropriate limitations on the powers of cemetery trustees and local authorities that manage cemeteries.

2.313 In our report on *Local Government: Results of the 1999-2000 Audits*, we commented on the issues surrounding local authorities competing with the private sector.⁵ Cemetery trustees are in a different position to local authorities in that cemetery trustees do not receive revenue from rates. However, the tax-free status of cemetery trustees means that the trustees selling headstones do not compete on a “level playing field” with private sector monumental masons.

⁵ Parliamentary paper B.29[01a] 2001, pages 35-42.

- 2.314 We observed in that report that the *ultra vires* rule requires a local authority acting in competition with the private sector carefully to consider the statutory authority for doing so.
- 2.315 We acknowledge the arguments raised that, in selling such things as memorial headstones and plaques from the cemetery office, the managers are providing a convenient service to people at a difficult time. That may be so, but this convenience must be tempered by:
- the need for a level playing field with private sector suppliers; and
 - most importantly, the fact that at present the Act does not authorise cemetery trustees, or local authorities that manage cemeteries, to engage in a commercial activity from the cemetery.
- 2.316 Until such time as Parliament determines otherwise, that will remain the position.

