

Deed of Agreement

Southern Metropolitan Cemeteries Trust
La Perouse Local Aboriginal Land Council
New South Wales Aboriginal Land Council

CHALK & FITZGERALD
LAWYERS & CONSULTANTS

Deed of Agreement

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Deed of Agreement

Date

This Deed is made on the fifteenth day of December 2016

Parties

Southern Metropolitan Cemeteries Trust (ABN 13 806 606 081) of 12 Military Road, Matraville NSW 2036 ('SMCT')

La Perouse Local Aboriginal Land Council (ABN 89 136 607 167) of 1 Elaroo Avenue, Phillip Bay NSW 2036 ('La Perouse LALC')

New South Wales Aboriginal Land Council (ABN 82 726 507 500) of 33 Argyle Street, Parramatta NSW 2150 ('NSWALC')

Background

- A. The *Aboriginal Land Rights Act 1983* (NSW) ('ALRA') is beneficial legislation which seeks to address historical injustice and ongoing disadvantage experienced by Aboriginal people in New South Wales.
- B. La Perouse LALC is a Local Aboriginal Land Council constituted by s 50 of the ALRA as the LALC for the La Perouse Local Aboriginal Land Council Area. It has the statutory objects and functions set out in the ALRA.
- C. NSWALC is also constituted by the ALRA, with statutory objects and functions under that Act.
- D. Between August 2006 and April 2016, La Perouse LALC made various Aboriginal land claims in relation to Lot 4858 on DP725015 at Matraville in New South Wales pursuant to section 36 of the ALRA (the 'Claimed Land').
- E. SMCT is a reserve trust established under the *Crown Lands Act 1989* (NSW) and is the reserve trust in relation to the reserves comprising the cemetery known as Eastern Suburbs Memorial Park. For the purposes of the *Cemeteries and Crematoria Act 2013* (NSW) ('CCA') it is the Crown cemetery trust for those reserves, and the board of SMCT is the Crown cemetery operator of the Eastern Suburbs Memorial Park.
- F. The Claimed Land is adjacent to Eastern Suburbs Memorial Park and SMCT wishes to expand that cemetery to include all or part of the Claimed Land.
- G. To facilitate the expansion of Eastern Suburbs Memorial Park into the Claimed Land, La Perouse LALC and NSWALC are willing to withdraw the Aboriginal Land Claims, and not make any further Aboriginal land claims in relation to the Claimed Land on the terms set out in this Deed.

Operative provisions

1. Definitions and interpretation

1.1 Definitions

In this Deed,

- (a) any term defined in the Reserves By-Law or the CCA has the meaning given to that term in the Reserves By-Law or CCA as the case may be; and
- (b) in addition, the following words and expressions have the following meanings:

Aboriginal Cemetery	means the exclusive Aboriginal cemetery and memorial garden to be established by SMCT pursuant to this Deed that is described in clause 6.
Aboriginal Land Claims	means the following claims for land made under section 36 of the ALRA in relation to the Claimed Land: <ul style="list-style-type: none"> • Aboriginal Land Claim 12802 lodged by La Perouse LALC on 4 August 2006; • Aboriginal Land Claim 32005 lodged by La Perouse LALC on 7 September 2010; and • Aboriginal Land Claim 40491 lodged by La Perouse LALC on 18 April 2016.
ALRA	means the <i>Aboriginal Land Rights Act 1983</i> (NSW).
Business Day	means any day of the week excluding any Saturday, Sunday or public holiday in New South Wales.
CCA	means the <i>Cemeteries and Crematoria Act 2013</i> (NSW).
Cemetery Reserves	means reserves no R 500600, R 66305 and R 77444 for “general cemetery” or “cemetery addition” at Matraville in New South Wales.
Claimed Land	means the area of land comprised in Lot 4858 on DP725015 at Matraville in NSW.
Deed	means this Deed of Agreement and includes all schedules, annexures exhibits or other attachments to this document.
Eastern Suburbs Memorial Park	means the Eastern Suburbs Memorial Park located at 12 Military Road, Matraville, New South Wales 2036 on the land known as Lot 7079 DP1110709.
Expansion Project	means the proposed expansion of the Eastern Suburbs Memorial Park into the Claimed Land, including the establishment of the Aboriginal Cemetery on that land, but not including the site investigations permitted under Crown licence RI 555118.
La Perouse Local	Means the La Perouse Local Aboriginal Land Council area

Aboriginal Land Council Area	constituted under the ALRA.
Law	includes the common law, principles of equity, and laws made by parliament/legislature (and laws made by parliament/legislature includes acts and regulations and other instruments under them, and consolidations, amendments, re-enactments or replacements of any of them).
Minister	means the Minister administering the <i>Crown Lands Act 1989</i> .
Promised Burial Rights	means the 125 burial licences in relation to burial places (or, if Part 4 of the CCA has commenced, perpetual interment rights in relation to interment sites) in the Aboriginal Cemetery, to be granted to La Perouse LALC under this Deed and that are described in clause 7.
Reserves By-Law	means the <i>Crown Lands (General Reserves) By-Law 2006</i> .
Security Burial Rights	means the 125 burial licences in relation to burial places (or, if Part 4 of the CCA has commenced, perpetual interment rights in relation to interment sites) in Eastern Suburbs Memorial Park, to be granted to La Perouse LALC as security and that are described in clause 5.

1.2 Interpretation

In this Deed, unless the context requires otherwise, the following rules of interpretation apply:

- (a) **(headings)** headings (including those in brackets at the beginning of a paragraph) are for convenience only and do not affect the interpretation of this document;
- (b) **(rules of construction)** no rule of construction operates to the detriment of a Party only because that Party was responsible for the preparation of this Deed or a relevant part of it;
- (c) **(clauses, schedules and annexures)** a reference to a clause, schedule or annexure is a reference to a clause in or annexure or schedule to this Deed;
- (d) **(singular and plural)** the singular includes the plural and vice versa;
- (e) **(forms of speech)** if a word or expression is defined, other parts of speech or grammatical forms of the same word or expression have corresponding meanings;
- (f) **(person)** a reference to a person includes a company, association, corporation or other body corporate, or a partnership or any government agency;
- (g) **(includes)** the word 'includes' or 'including' is not to be construed as a limitation;
- (h) **(dollars)** Australian dollars, dollars, A\$ or \$ is a reference to Australian currency;
- (i) **(statutes)** a reference to a statute includes any regulations and other instruments under it;
- (j) **(laws generally)** a reference to any statute, ordinance, code, regulation, by-law or other law includes any consolidation, amendment, re-enactment or replacement of any of them;
- (k) **(agreement in favour of two or more persons)** an agreement, representation or

warranty in favour of two or more persons is for the benefit of each of them individually and every two or more of them jointly;

- (l) **(executors, administrators, successors)** a reference to a particular person includes a reference to the person's executors, administrators, successors, and permitted assigns; and
- (m) **(variations or replacement)** a reference to a document, including this Deed, includes any variation or replacement of that document.

2. Condition precedent

- (a) It is a condition precedent to the commencement of clauses 3 to 13 that:
 - (i) if Part 4 of the CCA has not yet commenced – the Minister, pursuant to clause 27(4) of the Reserves By-Law; or
 - (ii) if Part 4 of the CCA has commenced – the Cemeteries Agency, pursuant to section 56(4) of the CCA,must have given SMCT approval to grant the Security Burial Rights and the Promised Burial Rights to La Perouse LALC, and must provide La Perouse LALC and NSWALC with satisfactory evidence that such approval has been given.
- (b) SMCT must not take any further steps in pursuit of the Expansion Project, including by seeking the addition of the Claimed Land to the Cemetery Reserves, until the condition precedent specified in subclause (a) has been satisfied.
- (c) SMCT must ensure that the condition precedent specified in subclause (a) remains satisfied until such time as the Promised Burial Rights are granted. In the event that an approval of the kind described in (a) is revoked, lapses or otherwise ceases to be operative, SMCT must immediately give La Perouse LALC and NSWALC notice of this.

3. SMCT's principal obligations

- (a) In consideration of La Perouse LALC and NSWALC agreeing to the obligations in clause 4, SMCT must:
 - (i) grant the Security Burial Rights to La Perouse LALC in accordance with clause 5;
 - (ii) establish the Aboriginal Cemetery in accordance with clause 6; and
 - (iii) grant the Promised Burial Rights to La Perouse LALC in accordance with clause 7.
- (b) SMCT must not take any action that is inconsistent with its obligations in this clause 2.

4. Land Council principal obligations

- (a) Upon:
 - (i) the condition precedent in clause 2(a) being satisfied; and

- (ii) SMCT granting the Security Burial Rights to La Perouse LALC in accordance with clause 5,

La Perouse LALC (being in each case the claimant Aboriginal land council) must withdraw the Aboriginal Land Claims.

- (b) La Perouse LALC and NSWALC each warrant to SMCT that, provided SMCT complies with its obligations under clause 3, they will not make any new Aboriginal land claim in relation to the Claimed Land.
- (c) SMCT acknowledges and accepts the undertaking given by La Perouse LALC and NSWALC in subclause (b).

5. Security Burial Rights

- (a) To secure the performance of its obligations under this Deed, SMCT must, within 5 Business Days of the condition precedent in clause 2(a) being satisfied, grant La Perouse LALC 125 burial licences relating to burial places (or, if Part 4 of the CCA has commenced, perpetual interment rights relating to interment sites) in Eastern Suburbs Memorial Park (the '**Security Burial Rights**') and give La Perouse LALC certificates of the kind referred to in clause 38 of the Reserves By-Law (or, if Part 4 of the CCA has commenced, section 65 of that Act) as proof that they have been granted.
- (b) Each Security Burial Right must:
 - (i) identify La Perouse LALC as the person to whom the rights are granted;
 - (ii) specify that the remains of at least 2 persons may be interred pursuant to the right; and
 - (iii) provide that La Perouse LALC may, by notice to SMCT and in its absolute discretion, nominate the persons whose remains may be interred pursuant to the right.
- (c) La Perouse LALC acknowledges that the Security Burial Rights are granted to it as security and can be used only in the circumstances in paragraph (e).
- (d) Upon the grant of the Promised Burial Rights in accordance with clause 7, La Perouse LALC must immediately return the Security Burial Rights to SMCT.
- (e) However, in the event that SMCT fails to grant the Promised Burial Rights within 36 months of the date of this Deed, La Perouse LALC may, after giving notice to SMCT, commence to use the Security Burial Rights in accordance with clause 8 as if they were the Promised Burial Rights referred to in clause 7, and SMCT must comply with clause 8 in relation to the use of those interment rights.
- (f) Nothing in this clause 4 limits the rights that La Perouse LALC or NSWALC otherwise have under this Deed.

6. Aboriginal Cemetery

- (a) As part of its Expansion Project, SMCT must establish on the Claimed Land an exclusive Aboriginal cemetery and memorial garden (the '**Aboriginal Cemetery**').

- (b) The Aboriginal Cemetery must:
 - (i) be for the interment of the remains only of Aboriginal persons who are members of La Perouse LALC or who are resident in the La Perouse LALC area, or members of their families;
 - (ii) be established to at least the same standard and with at least the same level of amenity as the rest of Eastern Suburbs Memorial Park;
 - (iii) be marked by a memorial gateway;
 - (iv) accommodate at least 125 double depth lawn sites (each for the interment of the remains of 2 persons); and
 - (v) include a memorial garden with capacity for keeping the ashes of and installing memorials for at least 100 people; and
 - (vi) be located, designed and established in close consultation with La Perouse LALC.
- (c) Subject to further investigations about site suitability (including geological investigation), the Aboriginal cemetery and memorial garden will be located approximately as indicated on the plan at Annexure A.

7. Promised Burial Rights

- (a) SMCT must grant La Perouse LALC 125 burial licences relating to burial places (or, if Part 4 of the CCA has commenced, perpetual interment rights in relation to interment sites) in the Aboriginal Cemetery (the '**Promised Burial Rights**') and give La Perouse LALC certificates of the kind referred to in clause 38 of the Reserves By-Law (or, if Part 4 of the CCA has commenced, section 65 of the CCA) as proof that they have been granted.
- (b) Each Promised Burial Right must:
 - (i) identify La Perouse LALC as the person to whom the rights are granted;
 - (ii) specify that the remains of at least 2 persons may be interred pursuant to the right; and
 - (iii) provide that La Perouse LALC may, by notice to SMCT and in its absolute discretion, nominate the persons whose remains may be interred pursuant to the right.
- (c) SMCT must grant the Promised Burial Rights to La Perouse LALC:
 - (i) before granting any other burial licence in relation to a burial place (or, if Part 4 of the CCA has commenced, interment right in relation to an interment site) on the Claimed Land to any other person; and
 - (ii) within 36 months of the date of this Deed, (and if not granted by that date, La Perouse LALC may commence using the Security Burial Rights pursuant to clause 5(e)).

8. Using the Promised Burial Rights

8.1 Nomination by La Perouse LALC

La Perouse LALC may nominate the persons whose remains are to be interred pursuant to each of the Promised Burial Rights, by giving notice of such nomination to SMCT. Subject to its obligations under Law, SMCT must comply with such nomination.

8.2 Transfer of Promised Burial Rights

- (a) Alternatively, La Perouse LALC may, by making application pursuant to clause 28 of the Reserves By-Law (or, if Part 4 of the CCA has commenced, section 58 of that Act), require SMCT to transfer one or all of the Promised Burial Rights to persons nominated by La Perouse LALC in its absolute discretion. Subject to its obligations under Law, SMCT must approve such application and comply with such requirement.
- (b) If La Perouse LALC gives a direction pursuant to paragraph (b), it may also require SMCT to vary the terms of the Interment Right or Rights concerned, so as to better facilitate the use of the Interment Right by the holder or holders. Subject to its obligations under Law, SMCT must comply with such requirement.

9. Protection of Aboriginal cultural heritage

- (a) SMCT acknowledges that the Claimed Land may contain places and objects of significance to Aboriginal people ('**Aboriginal Cultural Heritage**').
- (b) SMCT agrees to consult and work cooperatively with La Perouse LALC throughout the Expansion Project to ensure the proper assessment and protection of Aboriginal cultural heritage in relation to the Claimed Land.

10. Cooperation, communication and consultation

- (a) The Parties wish the Expansion Project, including the establishment of the Aboriginal Cemetery, to be a success and they recognise that to ensure it is one, and that this Deed is performed as intended, there is a need for continuing co-operation and open communication between them.
- (b) The Parties will communicate with each other openly, clearly and regularly to ensure that each of them is kept well informed of progress and all significant decisions.
- (c) Without limiting paragraph (b), SMCT and La Perouse LALC will meet regularly for the purpose of discussing the Expansion Project. Unless agreed otherwise between SCMT and La Perouse LALC, these meeting will occur at least once every 2 months (or more frequently as agreed), and may take place face to face, by telephone or by other agreed means.
- (d) Where consultation is required under this Deed, the consultation must be timely, informed and genuine.
- (e) The Parties will provide all reasonable assistance to each other Party to ensure the full performance of this Deed, including by promptly taking all steps, executing all documents and doing all things reasonably required by the other Party to give effect

to this Deed.

11. Disputes

11.1 Dispute Notice

If a dispute arises under this Deed, either Party may give notice to the other Party, providing full details of the dispute, and requiring the other Party to meet for the purpose of resolving the dispute (a '**Dispute Notice**').

11.2 Meeting

Within 10 Business Days of the Dispute Notice being given, representatives of the Parties with sufficient authority to resolve the dispute must meet, and must act promptly, reasonably and in good faith to resolve the dispute.

11.3 Mediation

- (a) If the Dispute has not been resolved within 10 Business Days of the first holding of a meeting, then either Party may, by notice given to the other, require that the dispute be referred to mediation (a '**Mediation Notice**').
- (b) If a Mediation Notice is given, the Parties must act reasonably and in good faith to agree upon a mediator. However, in the event that a mediator cannot be agreed within 5 Business Days, either Party may approach the Registrar of the ALRA to nominate a mediator.
- (c) Mediation of a dispute is to proceed in accordance with the practice and directions of the appointed mediator.
- (d) The Parties must act reasonably and in good faith throughout the course of any mediation to settle a dispute.
- (e) The cost of mediation will be paid equally by the Parties in dispute.

11.4 Proceedings

Generally, a Party may not commence a legal proceeding in relation to any dispute arising out of, or in relation to this Deed, until the Party has complied with the dispute resolution process in this clause. However, nothing in this clause shall prevent a Party from commencing a legal proceeding without complying with the dispute resolution process if the Party reasonably considers this is required in order to protect or preserve any right or interest under this Deed or under Law.

12. Notices

- (a) Any notice or other communication required or permitted to be given under this Deed:
 - (i) must be in writing;
 - (ii) must be signed by, or for and on behalf of, the Party giving or making it; and

- (iii) may be either delivered by hand, sent by post, transmitted by facsimile transmission or email, to the address, facsimile number and/or the email address for the recipient shown in Schedule 1 (or as otherwise stated in a notice given by the recipient).
- (b) Proof of posting or delivery of a notice or communication, or of dispatch of a facsimile or email, is, unless proven otherwise, proof of it being given:
 - (i) in the case of delivery by hand – on the day and at the time when the delivery occurred;
 - (ii) in case of ordinary pre-paid post – on the sixth Business Day after the date of posting;
 - (iii) in the case of facsimile transmission – on the day and at the time when the transmitting machine indicates the facsimile was sent in full; and
 - (iv) in the case of email – on the day and at the time at which the sender's mailbox indicates that the email was sent.

13. General

13.1 Entire agreement

This Deed contains the entire agreement between the Parties with respect to the subject matter of this Deed.

13.2 Legal relationship

Nothing in this Deed is intended to constitute the Parties as a partnership or to create a relationship of employment between the Parties.

13.3 Variation

No provision of this Deed or any right conferred by it can be varied except in writing signed by the Parties.

13.4 Waiver

A right under this Deed may only be waived in writing signed by the Party giving the waiver.

13.5 Acknowledgements

Each Party acknowledges that it:

- (a) enters into this Deed freely and voluntarily based upon its own information, legal advice and investigation;
- (b) does not execute this Deed as a result of or in reliance on any promise, representation, advice, statement or information of any kind given or offered to it by or on behalf of any other Party.

13.6 Counterparts

- (a) This Deed may be executed in any number of counterparts and all counterparts will be taken together to constitute one Deed.
- (b) A Party may execute this Deed by signing any counterpart.

13.7 Governing Law

This Deed is governed by the Law in force in New South Wales.

Schedule 1 – Details

Item	Description	Details
1.	SMCT's further details	
	Name	Southern Metropolitan Cemeteries Trust
	ABN	13 806 606 081
	Address for notices	12 Military Road, Matraville NSW 2036
	Facsimile for notices	95451010
	Email for notices	graham.boyd@smct.nsw.gov.au
2.	La Perouse LALC's further details	
	Name	La Perouse Local Aboriginal Land Council
	ABN	89 136 607 167
	Address for notices	1 Elaroo Avenue, Phillip Bay NSW 2036
	Facsimile for notices	N/A
	Email for notices	admin@laperouse.org.au
3.	NSWALC's further details	
	Name	New South Wales Aboriginal Land Council
	ABN	82 726 507 500
	Address for notices	PO Box 1125, Parramatta NSW 2124
	Facsimile for notices	9689 4593
	Email for notices	mark.dupuis@alc.org.au

EXECUTED AS A DEED

The Common Seal of **Southern Metropolitan Cemeteries Trust** (ABN 13 806 606 081) was hereto affixed in accordance with item 22 of Part 3, Schedule 2 to the *Cemeteries and Crematoria Act 2013* (NSW) by:



.....
Signature *Chairperson*

.....
Name *Anthony C. Simpson*

.....
Witness *CEO*

Name of Witness (print):

.....
Graham A. Boyd

Address of Witness (print):

.....
12 Military Rd
.....
Matraville NSW 2036

Executed by **La Perouse Local Aboriginal Land Council** pursuant to section 245 of the *Aboriginal Land Rights Act 1983* (NSW) in the presence of:



Chairperson



Witness

Name of Witness (print):

CHRISTOPHER INUREY

Address of Witness (print):

1 CLARKE AVENUE
LA PEROUSE NSW 2036

Executed by **New South Wales Aboriginal Land Council** pursuant to section 245 of the *Aboriginal Land Rights Act 1983* (NSW) in the presence of:



Chief Executive Officer



Witness

Name of Witness (print):

Carl Mark Dupuis

Address of Witness (print):

33 Argyle Street
Parramatta NSW 2150