

# KELLEHERS AUSTRALIA

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## In-House Memorandum

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### ***Burial Rights***

*The common grave of Wolfgang Amadeus Mozart in St. Marx Cemetery, Vienna, was subject to excavation after 10 years, unlike the graves of aristocrats<sup>1</sup>.*

In Australian law, the right to remain buried does not last forever. At common law, the dead may possess a contractual, non-proprietary right to burial<sup>2</sup>, but this has been said to exist as an 'irrevocable license' to remain undisturbed at least until the natural process of dissolution is complete<sup>3</sup>.

A 1908 High Court case found that, after burial, a corpse forms part of the land in which it is buried, with the right of possession transferring with the land<sup>4</sup>. However, as there is no clear point at which the process of bodily dissolution is complete, the State, through various statutory powers, can intervene with the right to remain buried in certain circumstances<sup>5</sup>.

Individual burial is a relatively modern phenomenon, formerly governed by ecclesiastical law and having relatively little precedent in common law<sup>6</sup>. In Victoria, rights to burial, or 'rights of interment', are governed under the *Cemeteries and Crematoria Act 2003* (Vic) ('the Act'). The objects of the Act are to ensure that human remains are treated with dignity and respect and that cemetery trusts operate effectively and efficiently<sup>7</sup>.

Under the Act, a cemetery trust may grant, subject to certain conditions, a right of interment in a public cemetery to any person<sup>8</sup>. This effectively grants a contractual right of interment, which is perpetual unless remains are cremated<sup>9</sup>. If remains are cremated, a right of interment may be either perpetual or 25 years in duration from the date of grant, unless extended<sup>10</sup>.

Although Mozart's burial place remains nameless, Mozart's memory is now preserved by a statue in the Musicians' Corner at Central Friedhof, in Vienna.

Cameron Algie  
16 July 2015

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<sup>1</sup> Brauneis, W. "Dies Irae, Dies Illa – Tag des Zornes, Tag der Klage": Auftrag, Entstehung und Vollendung von Mozarts "Requiem", *Jahrbuch des Vereins für Geschichte der Stadt Wien*, 47-8 (1991-2), pp.33-48.

<sup>2</sup> Vines, P. 'Resting in Peace?', 1998, *Sydney Law Review*. 78, p92.

<sup>3</sup> *Beard v Baulkham Hills Shire Council* (1986) 7 NSWLR 273

<sup>4</sup> *Doodeward v Spence* [1908] HCA 45.

<sup>5</sup> *Coroners Act 2008* (Vic), Div 5.

<sup>6</sup> Aries, P. *Western Attitudes towards Death*, (Johns Hopkins University Press), Baltimore, 1974.

<sup>7</sup> *Cemeteries and Crematoria Act 2003* (Vic), s2A.

<sup>8</sup> *Ibid.* s73(1).

<sup>9</sup> *Ibid.* s74.

<sup>10</sup> *Ibid.* s74(2).

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